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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 455.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank, et al., *Petitioners*,

v.

STANDARD SURETY & CASUALTY CO. OF NEW YORK, *Respondent.*

(And Six Other Actions Consolidated Therewith)

BRIEF FOR PETITIONERS.

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v.

STANDARD SURETY & CASUALTY CO. OF NEW YORK, *Respondent*.

(And Six Other Actions Consolidated Therewith)

BRIEF FOR FREDERICK S. DEITRICK, RECEIVER, AND BOSTON-CONTINENTAL NATIONAL BANK, PETITIONERS.

OPINIONS BELOW.

The opinion of the United States District Court is not reported. It appears in the record at pages 139-141.

The opinion of the Circuit Court of Appeals for the First Circuit appears in the record at pages 281-288, and is reported in 90 F. (2d) 862.

The opinion of the Circuit Court of Appeals for the First Circuit denying a petition for rehearing appears in the record at pages 291-293, and is reported in 90 F. (2d) 862, 866. The order of this court granting a writ of certiorari is reported in —— U. S. ——, 82 L. Ed. 102, 58 S. Ct. 143.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of Congress approved February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; 28 U. S. C. 347 (a).

STATEMENT OF THE CASE.

The petitioner, Frederick S. Deitrick, is the Receiver of the Boston-Continental National Bank, an insolvent banking association which was closed by order of the Comptroller of the Currency on December 17, 1931 (R. 44). The said Bank is the other petitioner and was established in December, 1930, by consolidation of the Boston National Bank and the Continental National Bank. The petitioner Bank is located in Boston in the District of Massachusetts.

The respondent, Standard Surety & Casualty Company of New York, is a New York corporation engaged in the business of writing surety and guaranty bonds and other like obligations, and conducted its business in Boston through its attorney-in-fact, one Percy G. Cliff, acting under a written power of attorney.

The respondent will be referred to as the "Surety Company", and the petitioner Bank and its predecessor, Continental National Bank, will be referred to as the "Bank". The Receiver, Frederick S. Deitrick and his predecessors in office, will be referred to as the "Receiver".

The three actions at law (R. 42, 43) were brought in the United States District Court for the District of Massachusetts by John B. Cunningham, as Receiver of the bank,

and were prosecuted by successive receivers of said Bank, of which the petitioner Frederick S. Deitrick is the last in order of succession and now holds said office. The Surety Company is the defendant in each of the actions at law. In these actions the Receiver sought to recover on three so-called "note-guaranty bonds" executed by the Surety Company as co-obligor with three separate borrowers from the Bank, namely, Westchester Discount Corporation, one Stone and one Robinson. The Bank was the obligee in each of the bonds. The bonds purported to guarantee the payment of certain notes of the respective borrowers, all of which proved to be uncollectible.

The four equity cases (R. 42, 43) were brought by the Surety Company against the Bank and its receiver, and sought the cancellation of the three note-guaranty bonds above referred to and also of a fourth bond of similar tenor given to secure the payment of the note of one Cronin. In each of the equity suits the Receiver and the Bank in their answers counterclamed on each of the note-guaranty bonds concerned (R. 194, 229, 252, 274).

The actions at law were referred to W. Barton Leach, Esquire, as Auditor under a stipulation that his findings of fact should be final, and the suits in equity were referred to the same party as Master (R. 26, 196). The cases were consolidated for trial and the Master and Auditor made a single report (R. 42-129). The Master and Auditor will be referred to collectively as the "Master".

The United States District Court ordered judgment for the defendant in the three actions at law; disallowed the Receiver's counterclaims in the suits in equity; and ordered decrees in favor of the Surety Company directing the surrender and cancellation of the bonds (R. 139-141). By order of the District Court all of the cases were consolidated for all purposes of appeal (R. 147).

The judgments and orders of the District Court were affirmed on appeal by the Circuit Court of Appeals (R. 289).

STATEMENT OF FACTS.

One Ragan was the President of the Boston-Continental National Bank and its predecessor Continental National Bank. He was engaged in a scheme to defraud the Bank for his own dishonest ends. For this purpose he enlisted the aid of Cliff, the Surety Company's attorney-in-fact for the Boston District (R. 45), who was duly licensed to conduct its business in the State of Massachusetts (R. 54). The Surety Company had given to Cliff a general and unlimited power of attorney which authorized him to execute and deliver in the name of the Surety Company with or without the impression of its corporate seal, various kinds of bonds and undertakings, including the type of note-guaranty bonds given as above stated (R. 93-95). The Surety Company had furnished Cliff with its corporate seal (R. 54,) printed forms, stationery, and other materials suitable for the writing of bonds and other obligations on behalf of the Surety Company and had also furnished him with multiple originals of this power of attorney, duly certified and authenticated by the officials of the Home Office of the Surety Company in New York (R. 46). Cliff's power of attorney in addition to granting unrestricted authority to execute "any and all bonds, recognizances, obligations, stipulations, undertakings, or anything in the nature of any of them which are or may be allowed, required or permitted by law, statute, rule, regulation, contract or otherwise" contained a clause of ratification reading as follows:

> "... and the Standard Surety & Casualty Company of New York hereby ratifies and confirms all that its said attorney-in-fact may lawfully do by virtue of these presents as fully and amply, to all intents and purposes as if same had been duly executed and acknowledged by the regularly elected officers of the Company, at the office of the Company, in New York, New York, in their own proper persons."

Said power of attorney also recited that it was made in accordance with and by the authority of a resolution of

the Board of Directors of the Surety Company, which was set forth in full in the power of attorney. Said power of attorney with the authenticating documents annexed thereto are set forth in full as Exhibit B to the Master's Report (R. 93-95).

When Cliff executed and delivered the several bonds he was told by Ragan that they would be exhibited to the Bank Examiners (R. 45, 54, 104) for the purpose of satisfying them that the promissory notes given by Cronin, Westchester Discount Corporation, Stone and Robinson (having an aggregate face value of approximately $120,000.00) were adequately secured because of the contracts of guaranty set forth in the respective bonds (R. 54). Ragan knew that in writing these particular bonds Cliff was violating certain private instructions from his principal (R. 47), although the terms of his power of attorney were sufficiently broad and general to authorize him to write bonds of this type (R. 54). Cliff knew the fraudulent character of his act (R. 54), but his motive for participating in the fraud was not disclosed. The Surety Company does not deny that the terms of the power of attorney were sufficiently broad to cover the type of bond here in question. The Surety Company had furnished Cliff with the multiple originals of his power of attorney with the intention that they should be shown to persons having dealings with Cliff in his capacity of attorney-in-fact for the Surety Company (R. 46), and the Cronin and Westchester Discount Corporation bonds each had a multiple original of the power of attorney attached to it from the time that the bonds were delivered to the Bank (R. 46, 49). These originals of the power were seen by the Bank Examiners and relied upon by them as proof of Cliff's authority in the premises (R. 54, 55) and when the Examiners made inquiry of Cliff as to the genuineness of the several bonds he assured them that they were in all respects genuine.

All of the bonds were exhibited to the Bank Examiners from time to time and were relied upon by them as being

genuine (R. 54, 55, 58), with the result that the true condition of the Bank was concealed from the Comptroller and his examiners thus temporarily forestalling vigorous action by the Comptroller to protect the depositors and prevent losses to potential new depositors (R. 59).

But for the existence of the note-guaranty bonds and reliance thereon by the directors, bank examiners and Comptroller, the Bank's unsound condition would have been discovered at a much earlier date, and the losses of the depositors would have been minimized (R. 58, 59). The directors of the Bank were not parties to the fraud and knew nothing of the circumstances surrounding Cliff's action in executing and delivering the bonds in question. The bonds were exhibited to the directors when the loans in question were under discussion for approval, extension or renewal from time to time (R. 53). Ragan made all of the loans in question without prior consultation with the Board of Directors, but all of the loans were approved by the Board shortly after they were made in reliance upon the bonds, and renewals and extensions thereof were likewise approved (R. 53). No officer or employee of the Bank, except Ragan, knew of any infirmity in the bonds (R. 53).

At the time each of the bonds was given, Ragan assured Cliff that the bonds were to be used only "as window-dressing" (R. 49); that they would never be enforced by the Bank; that they would be returned to Cliff in due time after they had served their purpose of satisfying the Bank Examiners that the notes in question were amply secured and constituted sound assets of the Bank (R. 49, 50, 52, 54). It was understood between Cliff and Ragan that Cliff would not report the writing of the bonds to his Home Office and would not bill any premiums to the principal obligors on the bonds (R. 45). Ragan at the time each bond was delivered, or shortly thereafter, gave Cliff a written release respecting each bond and he purported to execute these releases as president of the Bank. (R. 47, 50, 52.) Ragan never returned the bonds to Cliff and they remained

in the files of the Bank along with the notes secured thereby until discovered by the Receiver. The notes secured by the bonds were unpaid in substantial amounts aggregating approximately $120,000.00. The total capital of the Bank was $1,000,000. (R. 55.) The depositors of the Bank have suffered severe loss (R. 60) and although an assessment has been levied upon the stockholders to the full extent of their liability, the assets of the Bank available for depositors and other creditors will not be sufficient to pay them in full even if the bonds here in suit are collected in full with interest. Many of the deposits in the Bank were made after the execution of the bonds and after the Bank Examiners had seen them and had relied thereon as genuine obligations of the Surety Company (R. 58, 59), and other depositors permitted their funds to remain on deposit after said time.

The facts as found by the Master surrounding each of the bonds are briefly as follows:

The Cronin Bond.

Ragan was indebted to one Arthur Cronin in an amount exceeding $20,000.00. Cronin in turn was indebted to Obrion, Russell & Company for a sum in excess of $19,000.00 and was being pressed for payment. Cronin's financial condition was poor and he had no substantial balance in his checking account. Cronin told Ragan that, unless Obrion, Russell & Company were paid, both he and Ragan would be in trouble. On August 23, 1930, Ragan handed a note of Arthur Cronin in the amount of $20,000.00 to Harold J. O'Donnell, discount clerk and assistant cashier in charge of the Loan Department of the Bank from August, 1930, to December 17, 1931, and told him to discount the note and credit the proceeds to Cronin's checking account. This was done (R. 45). The purpose of Ragan in making the loan to Cronin was to keep himself out of trouble.

Shortly after September 1, 1930, Cronin and Ragan had a talk with Percy Cliff, and Ragan urged Cliff to give a guaranty bond covering Cronin's obligation which could be used to deceive directors, bank examiners, and all others who might inquire, into believing that the Cronin loan was secured. Cliff signed and sealed the bond, attached to it an original of his power of attorney, and delivered it to Ragan shortly after the first of September, 1930, and at the time of delivery received a paper dated September 9, 1930, signed by Ragan as president of the Continental National Bank, purporting to release the Surety Company from any obligation upon the Cronin bond (R. 47).

Ragan delivered the bond to O'Donnell as collateral for the Cronin note. O'Donnell deposited the bond in the collateral files of the Bank, which were in his charge. Cliff did not know that this bond or others were delivered to O'Donnell (R. 47). The original Cronin note was renewed from time to time and payments were made on account. The last note was for $14,000.00 given December 9, 1931, maturing January 4, 1932, and has not been paid in whole or in part (R. 48).

On March 21, 1931, Cliff, at the solicitation of Cronin and Ragan, delivered to Ragan an endorsement signed by Cliff as attorney-in-fact for the Surety Company, purporting to extend the Cronin bond in the amount of $15,000.00 to May 22, 1931. Another endorsement was given on May 21, 1931, purporting to extend the bond in the amount of $15,000.00 to November 3, 1931. A third endorsement was given on November 3, 1931, purporting to extend the bond in the amount of $14,000.00 to November 3, 1932. Ragan handed all of these endorsements to O'Donnell (R. 49, 96). No releases were at any time delivered to Cliff in connection with the execution and delivery of the endorsements above referred to.

The third endorsement, given on November 3, 1931, extended the bond "in an amount not to exceed Fourteen Thousand Dollars ($14,000.00) or such portion thereof as

may remain unpaid on date of November 3, 1932", and further provided "in event of default on the part of the Principal, said Arthur D. Cronin of Boston, the obligee, the said Continental National Bank of Boston, shall notify the Home Office of this Company at No. 80 John Street, New York City within five days by registered mail of such default" (R. 96). The Surety Company was notified within five days of November 3, 1932, by registered mail that Cronin had defaulted in payment in the amount of $14,000.00 and interest (R. 78).

The Westchester Bond.

In December, 1930, Ragan was attempting to accomplish a merger of the Continental National Bank and the Boston National Bank. In order to secure the Comptroller's approval of the merger it was necessary that ten thousand new shares of stock be subscribed for at $20.00 per share. Ragan told Cliff that he had to take up $40,000.00 of this stock; that if he failed to do it the banks would not be merged; that if the banks were not merged, the Continental National Bank might be closed by the bank examiners, in which event Cronin, Ragan, and Cliff would be ruined. He told Cliff that he wanted him to write a bond similar to the Cronin bond to secure a note of the Westchester Discount Corporation in the amount of $40,000., as the proceeds of this loan would enable him to take up the new stock and the bank examiners might not be satisfied with the Westchester loan without a bond (R. 49).

Ragan assured Cliff that the bond would be used only to deceive the bank examiners and others; that there would be no liability under the bond, and a release similar to the Cronin release would be given. Cliff gave the bond as requested, and attached to it an original of his power of attorney (R. 49).

This bond obligated the Surety Company to the Continental National Bank in the full and just sum of $40,000.00. The condition of the bond was the payment by Westchester

Discount Corporation of four notes, dated December 20, 1930, for $10,000.00 each, maturing at 30-day intervals beginning January 20, 1931. There never were any notes for $10,000.00 each made by Westchester Discount Corporation and held by the Bank. There was one note of the Westchester Discount Corporation of $40,000.00, dated December 23, 1930, maturing in four months (R. 49, 96, 97). Cliff received a release dated December 23, 1930, executed by Ragan for the Bank, which purported to release the Surety Company of all liability under the Westchester bond. Ragan after receiving the bond from Cliff, delivered it with the Westchester note to O'Donnell with instructions to discount the note and credit the proceeds to the account of Westchester Discount Corporation. This O'Donnell did (R. 50).

Westchester Discount Corporation paid $1,050.00 on account of this loan on January 20, 1931. No other amount was ever paid; no new note was given. On April 20, 1931, Cliff, at the solicitation of Ragan, delivered to Ragan an endorsement signed by Cliff as attorney-in-fact for the Surety Company purporting to extend the Westchester bond in the full amount to June 20, 1931. A second endorsement was given on June 20, 1931, purporting to extend the Westchester bond in the full amount to December 20, 1931 (R. 50, 98). No release was ever delivered to Cliff in connection with the execution and delivery of either of the aforesaid endorsements.

The second endorsement provided "in event of default on the part of the principal, said Westchester Discount Corporation of Mt. Vernon, New York, the obligee, the said Continental National Bank of Boston and/or its successors and assigns, shall notify the Home Office of this Company at No. 80 John Street, New York City, within five days by registered mail of such default" (R. 98). Notice of default was given within five days of December 20, 1931, by registered mail to the Home Office of the Surety Company (R. 79).

The Stone Bond.

On June 2, 1931, Joseph Stone owed the Bank $51,700.00 upon existing notes, the proceeds of which were originally received by Stone. On that date Ragan told Cliff that the bank examiners were in the Bank; that he had told the examiners that Stone's loan, which with interest would exceed $52,000.00, was covered by a bond; and that, if Cliff would give another bond for $52,000.00 to be shown to the bank examiners, Ragan would be able to give him back the Stone bond as well as the Cronin and Westchester bonds (R. 50). As treasurer of Westchester Discount Corporation, Stone had signed the note and bond of that corporation above referred to (R. 97).

Cliff gave the bond on June 2, 1931. No power of attorney or copy was attached to this bond. A release dated June 4, 1931, was given to Cliff signed by Ragan, as president of the Bank, its terms being broad enough to release the Surety Company from all obligation (R. 50).

On June 4, 1931, Stone's indebtedness amounted to $52,222.75, and the several notes making up this indebtedness were renewed from time to time until the Bank closed, the amount of his indebtedness never sinking below $52,000.00 (R. 51).

The condition of the Stone bond, which was dated June 2, 1931, was "that if the said Joseph Stone shall, within one year from this date, make to the Boston Continental National Bank full and true payment of an obligation in the sum of Fifty-two Thousand Dollars ($52,000.00), then this obligation shall be void, otherwise shall remain in full force and effect." The bond further provided "in the event of default on the part of the principal, one year from this date, the obligee shall notify the Home Office of the said Surety Company at No. 80 John Street, New York City, New York, within ten days by registered mail of such default. . ." (R. 98, 99). No notice of default of the Stone bond was given to the Surety Company until on or about June 30, 1932, at which time a notice was given which com-

plied with the requirements of the bond except as to time (R. 80). Suit to cancel this bond was started by the Surety Company February 23, 1932, more than three months before it was due (R. 182).

The Robinson Bond.

On July 7 and 8, 1931, Ragan told Cliff that a loan was to be made to Gordon A. Robinson, doing business as Robinson Engineering Co., for $20,000.00; that the loan was for the benefit of Cronin, Robinson's brother-in-law; that it was unwise to make the loan in Cronin's name, but Cronin was to get the money. He told Cliff a bond was needed and that a release would be given as in the other cases. Cliff understood that this bond was to be used for the purpose of giving the appearance that the loan was secured by a surety bond and that it would be shown to the bank examiners. (R. 52.) Cliff gave the bond on July 8th, no power of attorney being attached. Later on the same day, and as part of the same transaction, Ragan delivered to Cliff a release in the same form as the previous release (R. 51, 52).

The Bank on July 8, 1931, after receiving this bond, discounted a note of Robinson's for $20,000.00, maturing November 9, 1931, put $4,593.33 of the proceeds under a certificate of deposit, which was additional security for the note, and credited Robinson's account with $15,406.67. Cronin got the amount thus credited. The loan was made for his benefit (R. 52).

On November 12, 1931, three days after the maturity of this note, $1,000.00 was paid to the Bank on account of this obligation and Robinson gave a new note for $19,000.00 maturing November 9, 1932. By application of the certificate of deposit and by other payments, the balance due on the Robinson account has been reduced to $14,403.52 (R. 52). On November 12, 1931, Oliver Ames, then a Vice-President of the Bank, dictated to Ragan's secretary, in his presence, a letter to the Surety Company stating that Robinson had

asked for a renewal of his note and requesting the company to confirm in writing their liability with respect to such renewal. (R. 129.)

Ragan intercepted this letter before it got into the mails, and at his request Cliff wrote to the Bank in his capacity as manager of the Boston Branch Office of the Surety Company, informing the Bank that Ames' letter had been sent to him by the Home Office for answer; that he handled all New England business, and that all questions should thereafter be referred to him; that the terms of the bond were explicit as to renewals; that there was no necessity for notice as to renewals and extensions; and that notice was required only within the stipulated period after the expiration of the bond itself. This letter was on stationery of the Surety Company (R. 129).

The Robinson Bond, dated July 8, 1931, provided "The condition of this obligation is such that if Gordon A. Robinson shall within four months from date hereof make to the Boston Continental National Bank full and true payment of note in the amount of Twenty Thousand Dollars ($20,000.), maturing November eighth, nineteen hundred and thirty-one, or of any extension thereof, in whole or in part, then this obligation shall be void, otherwise shall remain in full force and effect." (R. 99.)

The bond further provided "in the event of default on the part of the principal, the obligee shall notify the Home Office of such Surety at No. 80 John Street, New York City, New York, within ten (10) days, by registered mail, of such default and the Surety Company shall, within thirty (30) days, pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid note, or any extension or renewal thereof at time of default, four months from date hereof and in no event exceeding Twenty Thousand Dollars ($20,000.00); the liability of the Surety Company with respect to any such extension or renewal, in no event to extend beyond date of July eighth, nineteen hundred thirty-two." (R. 100.)

On July 10, 1932, the Bank gave notice to the Surety Company which in form complied with the requirements of the Robinson bond (R. 81).

Receiver's Action Against Fidelity & Deposit Company of Maryland.

By writ dated December 21, 1932, the original receiver brought suit against Fidelity & Deposit Company of Maryland on certain so-called "bankers' blanket-fidelity bonds", issued by that company insuring the Bank against loss by the fraud of its officers. In that suit, the receiver submitted claims aggregating $501,385.24, arising from losses sustained by the Bank, alleged to have resulted from the fraudulent conduct of Ragan. Among the several items of loss listed by the Receiver in his claim against Fidelity & Deposit Company were the losses sustained with respect to the several promissory notes which the note-guaranty bonds here in question purported to secure, which the Receiver had then ascertained were probably uncollectible. The Receiver filed with the Fidelity & Deposit Company his notice of loss under the Fidelity bonds above referred to, under date of April 28, 1932, and supplemented this by a formal proof of loss on June 2, 1932. But, on February 23, 1932 (prior to the filing of the notice of loss and proof of loss above referred to), the Surety Company had brought in the Superior Court for the Commonwealth of Massachusetts the four bills in equity, seeking the cancellation of the bonds which are now before this court (R. 81-87).

On October 10, 1934, the Receiver's suit against the Fidelity & Deposit Company was settled by compromise by the payment to the Receiver of $100,000.00. The compromise and settlement was carried out pursuant to an agreement between the parties, whereby the Receiver expressly reserved all rights against the Standard Surety & Casualty Company with respect to the four bonds, and the endorsements thereto which are the subject of the instant cases.

The Surety Company was a re-insurer on the fidelity bonds issued by the Fidelity & Deposit Company, and the Receiver was aware of this fact at the time the compromise with the Fidelity & Deposit Company was effected (R. 87, 88).

Subject—Index to Master's Report.

The Bank, its President and its Receiver (R. 44).
The Cronin transaction (R. 44-49).
The Westchester transaction (R. 49, 50).
The Stone transaction (R. 50-51).
The Robinson transaction (R. 51, 52).
Reliance upon the bonds by creditors of the Bank. (R. 54-59.)
Notice of Default (a) of Cronin bond (R. 76-78).
(b) of Westchester bond (R. 78-79).
(c) of Stone bond (R. 79, 80).
(d) of Robinson bond (R. 80, 81).
Election of remedy (R. 81-88).

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the First Circuit erred in ruling:

(1) That all defenses available against a national bank are available against its receiver after the bank has become insolvent, on the theory that such receiver stands no better than the bank itself.

(2) That since Ragan (the Bank's president) knew that Cliff (the Surety Company's agent) was acting in fraud of his principal and violating the latter's instructions in executing the bonds, such knowledge on Ragan's part is to be imputed to the Bank with the result that the Receiver cannot recover on the bonds.

(3) That inasmuch as the Bank itself could not have enforced the contracts of the Surety Company set forth in

the bonds, the Receiver cannot enforce such contracts or recover thereon, even though:

(a) Cliff's written and publicly disclosed power of attorney included authority to write bonds of this type and contained a ratification of all that Cliff might do within the scope of the power;

(b) Cliff gave the bonds with the intent that they should appear to be valid and enforceable obligations of the Surety Company in favor of the bank;

(c) Cliff intended that the bonds should be shown to the Bank Examiners and relied upon by them as valid obligations of his principal;

(d) Cliff furnished with two of the bonds authenticated multi-originals of his power of attorney, with the intent that they should be exhibited to the Bank Examiners as proof of his authority to execute the bonds;

(e) The Surety Company had furnished Cliff with these multi-original powers of attorney for the purpose of having them shown or delivered to third parties dealing with Cliff as proof of his unlimited authority;

(f) the Bank Examiners saw and relied upon the bonds and the power of attorney;

(g) the Bank Examiners failed to seasonably discover the unsound and eventually insolvent condition of the Bank because of such reliance; and

(h) the Bank's depositors and other creditors suffered loss because of such reliance.

SUMMARY OF ARGUMENT.

The Receiver's position rests primarily upon the proposition that the circumstances surrounding the giving of the note-guaranty bonds by Cliff to the Bank accompanied by the supporting powers of attorney, duly certified and authenticated by the Surety Company through its proper executive officers (which instruments had been furnished him

by the Surety Company with the intent on the part of its directors and executive officers that they be used for the exact purpose for which Cliff used them in the instant cases), and the consequences which followed the credence given to said bonds and powers of attorney by the national bank examiners and the Comptroller, acting as the representatives of the depositors and other creditors, give rise, in a suit by the Receiver to enforce the bonds, to an *estoppel* which precludes the Surety Company from denying the validity of the bonds and from asserting as a defense that its agent acted fraudulently and without authority in executing the bonds and that a fraudulent official of the Bank knew of the agent's misconduct.

The basic conception upon which rests the Receiver's position has been recognized and applied in decisions of this court holding in effect that a receiver of an insolvent corporation and particularly of an insolvent national bank may have rights which rise higher than those of the corporation itself as a going concern, or may not be subject to defenses which would have been effective against the corporation. This court has never rendered any decision which expressly decides that the doctrine of estoppel here invoked by the Receiver is not applicable to a set of facts such as are revealed in the instant cases. The decision in *Rankin, Receiver* v. *City National Bank,* 208 U. S. 541, principally relied upon by both courts below, does not hold that such an estoppel does not arise. Several of the lower federal courts, as well as the highest courts of a majority of the several states, have recognized this doctrine of estoppel as applicable to facts and circumstances such as exist in the cases at bar.

The instant cases do not fall within the class of cases wherein is applied the rule of law which holds that when two equally innocent parties are victims of the fraud of their respective agents the law will not intervene to relieve the one of the burden of the loss and shift it to the other, but will let the loss remain where it lies when the fraud is

discovered. That rule is not applicable to the instant cases because here the real question is whether the eventual loss should fall upon the proprietors (stockholders) of the solvent Surety Company who, through their properly appointed officers, armed Cliff with indisputable indicia of authority to execute the bonds sued on, or whether the loss should fall upon the innocent depositors and other creditors of the insolvent bank who were in no way responsible for the duplicity of either Cliff or Ragan. In other words, in these cases there are (or might have been) three groups of parties concerned, namely:

(1) the stockholders of the Surety Company, who will be the eventual sufferers if the loss is imposed upon their corporation;

(2) the stockholders of the Bank, who would be the sufferers if the Bank were solvent; and

(3) the depositors and creditors of the Bank, who will in fact be the sufferers if the Surety Company is permitted to escape liability, since the Bank is insolvent and cannot pay its creditors in full even with the funds available from stock assessments.

If the Bank were solvent it might well be that the rule above referred to would properly be applied and the loss allowed to rest with the Bank. Such a ruling would recognize the fact that both groups of stockholders had been unfortunate in the selection of their agents, although equally innocent of wrong doing. But the Bank's stockholders are no longer concerned. The question is whether the loss shall fall upon the stockholders of the solvent Surety Company or on the innocent depositors and creditors of the insolvent bank.

In the case of a national bank, its depositors and creditors constitute a separate group of parties in interest and are recognized as such by the national banking laws. The Comptroller of the Currency, who is selected not by the stockholders of the bank but by the Government (because

of the public character of national banks and their functions and activities) represents the depositors and creditors and has the duty to protect their interests. So long as a national bank is a going concern the Comptroller performs his functions of representation and protection of the depositor-creditor group through the bank examiners. When the bank has ceased to be a going concern these functions are performed through a receiver. When a person extends credit to a national bank by a deposit of money therein or otherwise he adopts the representation of the Comptroller of the Currency for the protection of his interests. He has no other means of protection. Therefore, when in circumstances such as appear in the instant cases the equities as between the Surety Company's stockholders are weighed against those of the depositor-creditor group, it is found that they are not equal. The depositors and creditors were wholly innocent, both personally and through their legally appointed representatives, of any knowledge of or participation in any wrong doing. On the other hand, the stockholders of the Surety Company have, by the method of business adopted by their responsible representatives, invited the representatives of the depositor-creditor group (namely, the bank examiners and the Comptroller of the Currency) to place reliance upon the promises and representations of the Surety Company's agent with consequent loss to depositors and creditors of the bank.

To say that the rights of a national bank as a corporate entity are identical with those of its receiver is to ignore the realities implicit in the scheme of the national banking system, which recognizes that the interests of the depositor-creditor group are of especial concern to the Government and require the protection of the Government. Such a receiver may derive certain rights in behalf of the creditors through the creditors rather than through the bank itself and may likewise, on grounds of estoppel springing from considerations of public policy, strike down certain defenses which might have been interposed against the bank itself.

For these reasons the Receiver in the instant cases is entitled to relief, even assuming that the Bank as such would not be entitled thereto. To hold otherwise would tend to defeat the purposes of the regulatory statutes governing national banks and would conflict with sound public policy, inasmuch as such a ruling would permit persons in connivance with a fraudulent bank official to loot the bank by placing spurious notes and other obligations among its assets, with the intent that the bank examiners should regard the same as genuine, and then to escape liability by pleading the making of an agreement by the faithless bank official to the effect that the obligations would never be enforced by the bank.

The intimation appearing in the opinions of the Circuit Court of Appeals for the First Circuit that the Receiver in the instant cases might have been entitled to relief had he adopted a different form of pleading, is not founded on a sound conception of the principles of law involved in the instant cases. The only alternative to an action sounding in contract to enforce the promises contained in the bonds would be an action of tort for deceit. But no deceit will have been successfully practiced on the Bank's depositors and creditors if the Surety Company is held to be estopped to deny both the validity of its written obligations executed by Cliff and the binding force of the unlimited power of attorney which it gave to Cliff for just the use to which Cliff put it and its solemn ratification expressed in the power of attorney of all that Cliff might do pursuant to the power.

The Surety Company's secondary defenses based upon (1) the alleged deficiencies surrounding the Receiver's notices of default given to the Surety Company, (2) the alleged variance between the note of Westchester Discount Corporation held by the bank and the description thereof set forth in the bond given by the Surety Company to secure the same, and (3) the alleged election of remedy made by the Receiver with respect to certain fidelity or theft indemnity bonds held by the Bank, are all without substance or merit.

ARGUMENT.

I.

The Receiver of an Insolvent National Bank is Not, in All Cases, Subject to Defenses Which Could Have Been Successfully Interposed in a Suit by the Banking Corporation Itself as a Solvent Going Concern.

The basis of the decisions of the United States District Court and the Circuit Court of Appeals, except that portion of the decisions of the Circuit Court of Appeals relating to the pleading question which will be dealt with hereafter, is that the petitioners are not entitled to relief because if the Bank as a going concern had instituted suit upon the bonds here in question it could not have recovered and the Receiver stands no better than the Bank itself.

The petitioners do not admit that the Bank could not have recovered if it had instituted an appropriate action on the bonds here in question prior to insolvency because there is considerable doubt as to whether the knowledge of a defaulting bank officer can be imputed to the bank under circumstances such as those involved in these cases. It must be borne in mind that throughout the transactions here in question Ragan acted solely in his own interest or in the interest of his confederates and never in the interest of the Bank. Whatever Ragan did or knew in the premises he did or knew in connection with the perpetration of a fraud upon his own principal, the Bank, and the knowledge which he had as to Cliff's breach of faith was inextricably intertwined with his own fraudulent acts. On such a state of facts an exception to the rule, that the knowledge of an agent is to be imputed to his principal, is applicable. This exception to the rule is clearly set forth in *American National Bank* v. *Miller*, 229 U. S. 517, 522, 57 L. Ed. 1310, (1913). The exception is based upon the proposition that where it is to the interest of an agent to conceal information from his principal it will not be presumed that he disclosed the information to his principal. This exception to

the rule was adopted and applied by the Supreme Judicial Court of Massachusetts in the case of *Innerarity* v. *Merchants National Bank,* 139 Mass. 332, 333, 1 N. E. 282 (1885), wherein the court stated:

> "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would, necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating."

See also *Allen* v. *South Boston Railroad,* 150 Mass. 200, 22 N. E. 917, (1889); *Broadway National Bank* v. *Heffernan,* 220 Mass. 247, 107 N. E. 921, (1915); *Indian Head National Bank* v. *Clark,* 166 Mass. 27, 43 N. E. 912, (1896).

To say that Ragan's knowledge of Cliff's breach of faith with his principal, the Surety Company, is to be imputed to Ragan's corporate principal, the Bank, is merely to state the abstraction or fiction which the common law created in its effort to do justice between two parties, one or both of whom have dealt through an agent. But the doctrine of imputation of knowledge, being based upon a legal fiction, should not be invoked except where necessary to attain the ends of justice. In the instant case the axis of imputation might perhaps extend to the Bank represented by Ragan and be projected on to the banks' proprietors, its stockholders, should the ends of justice demand that they stand the loss, as would be the case if the bank were solvent or could pay its depositors and creditors in full from its assets enhanced by the stock assessments. But since the present cases involve a public banking institution which has become insolvent and whose stockholders have suffered to the full extent provided by the law and their contribution by way of assessment (together with the proceeds of all the

assets of the bank) are insufficient to pay the depositors and creditors in full (R. 60), the axis of the imputation of Ragan's knowledge should not be forked or distorted to strike the bank examiners and the Comptroller, and through them the depositors and other creditors who were in no way responsible for Ragan's appointment to the position which enabled him to connive with Cliff for the purpose of despoiling the depositors and creditors. The fiction of imputation of knowledge is an incident to the law of agency but Ragan was not either directly or indirectly the agent of the public officers charged with the duty of protecting the interests of the depositors and creditors.

However, we are not here interested directly with the question of whether the Bank as a going concern could have recovered upon the bonds here in suit. As in the recent decision of this Court in *McCandless* v. *Furlaud,* 296 U. S. 140, 80 L. Ed. 121, (1935), it is immaterial in these cases whether the corporation could have recovered and therefore our argument will deal directly with the question of whether the Receiver as the representative of the depositors and creditors is entitled to recover upon the note-guaranty bonds.

The only necessity for even discussing the right of the Bank as such to recover in the instant cases is the fact that both courts below construed decisions of this court as establishing a general rule to the effect that a receiver of an insolvent national bank stands no better than the bank itself. We deny that proposition. It is true that in several decisions of this court, there is found by way of dicta, statements that the receiver of an insolvent national bank stands no better than the bank itself. In *Rankin* v. *City National Bank,* 208 U. S. 541, 52 L. Ed. 610, (1908), which case will be discussed at length hereinafter the following statement is found at page 546:

> "...if the Guthrie bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank."

In the case of *Scott* v. *Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, (1892), wherein the court was dealing only with the right of set-off with respect to debts and credits in settling a claim of a depositor of a closed bank, the following language is found at page 507:

> "The receiver took the assets of the Fidelity Bank as a mere trustee for creditors, and not for value and without notice, and, in the absence of statute to the contrary, subject to all claims and defenses that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached."

In the case of *Fourth Street National Bank* v. *Yardley*, 165 U. S. 634; 41 L. Ed. 855, (1897), it was held that where an equitable lien upon certain assets of an insolvent national bank existed prior to the closing of the bank the receiver took the assets subject to the lien.

It is submitted that in none of the three aforementioned cases did this court attempt to lay down a general rule of law applicable to receivers of national banks covering all circumstances.

This court has recognized that under certain circumstances a receiver of an insolvent national bank is not subject to defenses which would have been available in a suit by the bank itself as a solvent going concern. In the case of *Texas and Pacific Railway Co.* v. *Pottorff, Receiver*, 291 U. S. 245, 78 L. Ed. 777 (1934), it was held that a depositor could not enforce against a receiver of a national bank a contract under which the bank had agreed to segregate certain of its securities and hold the same as collateral to secure the repayment of the customer's deposits. In that case, the receiver was held not to be bound by the agreement as to security and the depositor was left in the position of an unsecured creditor of the bank. This court, speaking through Mr. Justice Brandeis, stated at page 260-261:

"But even if the bank could have been estopped from asserting lack of power, its receiver would be free to challenge the validity of the pledge. The unauthorized pledge reduced the assets available to the general creditors. It is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation itself was not in a position to do so.

"• • • The receiver may assert the invalidity of the pledge without making restitution by paying the pledgees' claim in full."

See also *City of Marion* v. *Sneeden,* Receiver, 291 U. S. 262, 78 L. Ed. 787 (1934).

This court has twice held that a stockholder of a defunct national bank is liable for the payment of a stock assessment, even though his shares were purchased from the bank itself in reliance upon grossly fraudulent misrepresentations as to the condition of the bank made by officers of the bank for the purpose of inducing the stockholder to purchase the shares. See *Scott* v. *Deweese, Receiver,* 181 U. S. 202; 213; 45 L. Ed. 822 (1901); *Lantry* v. *Wallace, Receiver,* 182 U. S. 536, 550, 551, 45 L. Ed. 1218 (1901). In each of those cases, the bank itself was the vendor of the stock and the fraudulent misrepresentations were made by officers of the bank who had been duly authorized to sell the shares in question. As a result of the decisions in those two cases the receivers were held entitled to enforce, *for the benefit of the banks' creditors,* obligations which were imposed upon those stockholders as a result of the fraudulent acts of the banks' own officers. In the case of *Oppenheimer* v. *Harriman National Bank and Trust Company,* 301 U. S. 206, 81 L. Ed. 1042, (1937), it was held that where one was induced to purchase stock of a national bank by misrepresentations made by an officer of the bank, he may have the right to rescind the contract of purchase, either before or after the bank becomes insolvent and a receiver is appointed, but that such rescission, if after insolvency,

would not relieve the purchaser of the stock from liability for the stock assessment levied for the benefit of the creditors of the bank and collectible by the receiver on their behalf.

Thus, it appears that the policy of the national banking law requires that even if a stockholder has been the victim of a fraud perpetrated by a bank official, the fact of the fraud does not avail him when upon insolvency the bank's receiver seeks to enforce against him the very obligation which he was induced to assume by virtue of the fraud. He must first perform that obligation for the benefit of the depositors and creditors and pay the monies due on stock assessments arising from the ownership of record of the stock and then, but then only, may he be heard to assert his rights as a creditor of the bank to the extent of the initial loss which he suffered because of the fraud. In essence, the rights of the depositors and creditors (represented by the receiver) are deemed to be paramount and equities in favor of the defrauded party which would have prevailed had the bank itself and its proprietor stockholders been the parties in interest must give way to the superior equities in favor of the receiver.

It is submitted that these cases recognize and rest upon the principle that the receiver of an insolvent national bank is not in all cases subject to defenses which could have been successfully interposed in a suit by the banking corporation itself as a solvent going concern, and that the rights of the receiver will be recognized as being superior to those of third parties who have dealt with the bank and its officials, whenever public policy, invoked in aid of the protection of the national banking system, demands that the interest of the depositors and other creditors be regarded as paramount.

This court has recently held in the case of *McCandless* v. *Furlaud, et al.* 296 U. S. 140, 160, 80 L. Ed. 121 (1935) that the receiver of a private corporation (as distinguished from a national banking association) may recover illicit

profits from fraudulent promoters and that in so recovering the receiver acts as the representative of the creditors of the corporation and for their benefit. The decision in that case appears to be an express recognition of the legal principle that where the ends of justice so require, a receiver acting as the representative of the creditors and for their benefit may enforce rights which the corporation itself could not have enforced.

II.

The Surety Company is Estopped to Deny the Validity of the Note-Guaranty Bonds as Against the Receiver of the Insolvent National Bank in His Capacity as a Representative of the Depositors and Creditors Thereof.

In the lower courts the Surety Company included in its defenses the contention that its agent, Cliff, was not authorized to execute the particular note-guaranty bonds here in question and that in any event the Bank was bound by certain releases executed by Ragan who purported to act on behalf of the Bank. Irrespective of the question as to whether such defenses would have been available against the Bank as a going solvent institution, it is the contention of the Receiver that the Surety Company is estopped from asserting said defenses as against the receiver of an insolvent national bank acting on behalf of the depositors and other creditors, for the reasons which will be discussed in the following subsections:

A.

National banks are creatures of the Federal Government and their business is vested with a public interest.

The services rendered by national banks and other public banking institutions and the part they play in the economy of the nation place them in a special category entirely different from that of ordinary private business corporations. Therefore, rules of law which accomplish a desirable and

equitable result when applied to ordinary business corporations or individuals may accomplish a very injurious and undesirable result if applied to national banks and other public institutions.

This court has held that the establishment of a national banking system is a proper exercise of a governmental function under the constitution. *McCulloch* v. *State of Maryland* (1819) 17 U. S. 316, 4 L. Ed. 579; *Osborn* v. *The Bank of the United States,* (1824) 22 U. S. 738, 6 L. Ed. 204. See also *Farmers and Mechanics National Bank* v. *Dearing,* (1875) 91 U. S. 29, 23 L. Ed. 196; *Cook County National Bank v. U. S.* (1883) 107 U. S. 485, 27 L. Ed. 337; *Easton* v. *Iowa* (1903) 188 U. S. 220, 47 L. Ed. 452.

Congress having the power to create a system of national banks has the sole power to regulate and control their operations. *Davis* v. *Elmira Savings Bank,* (1896) 161 U. S. 275, 40 L. Ed. 700; *Easton* v. *Iowa, supra.* In the exercise of that power the Congres has established the office of the Comptroller of the Currency (12 U. S. C. 1, see Appendix p. 92). The duties of the Comptroller include the chartering of all national banks (12 U. S. C. 27, see Appendix p. 92), and regulating the business of those banks as prescribed by the statute.

The statute provides for the maintaining of a staff of experts to make periodic examinations of all national banks (12 U. S. C. 9, see Appendix 92). The status and functioning of a national bank examiner was described in the case of *Witters* v. *Sowles,* 32 Fed. 762 (C. C. A. Vt.) (1887) at page 764, as follows:

> "He represented a department of the Government which supervises and controls the banks as to whether in certain cases they shall do business at all or not, but it does none for them, other than to wind up their affairs for their creditors. The Examiner makes report to that department to furnish a basis for action with reference to the continuance of the banks in business."

All national banks are expressly subject to examination by the examiners appointed by the Comptroller (12 U. S. C. 481, see Appendix p. 95), and the banks must submit regular reports to the Comptroller disclosing their condition (12 U. S. C. 161, see Appendix p. 94).

In addition, the Congress has imposed a duty upon the Comptroller to report to it any suggestions he may have by which the system may be improved and by which the "*security of the holders of its notes and other creditors may be increased.*" (12 U. S. C. 14, see Appendix p. 92). The quoted phrase indicates a disposition on the part of the Congress to regard the depositors and other creditors of a national bank as a special group or class whose protection is of vital concern to the Government.

If the Comptroller concludes from the reports of his examiners that there has been an impairment of the capital structure of any national bank he may require the directors and stockholders of the bank to remedy the impairment (12 U. S. C. 55, see Appendix p. 93), and in the event that stockholders and directors fail to comply with the requirement he may appoint a receiver for the protection of the depositors and creditors of the bank, whose duty it is to liquidate the bank and make a ratable distribution of the proceeds of the assets to depositors and other creditors (12 U. S. C. 191, 194, see Appendix pp. 94, 95) *Ex parte Chetwood*, 165 U. S. 443, 41 L. Ed. 782 (1897); *U. S.* v. *Weitzel*, 246 U. S. 533, 62 L. Ed. 872 (1918); *Hulse* v. *Argetsinger*, 18 F. (2d) 944; at 945 (C. C. A. 2nd) (1927); *Lehman* v. *Spurway*, 58 F. (2d) 227 at 228 (C. C. A. 5) (1932); *In Re Battani, et al.* 6 F. Supp. 376 at 379 (D. C. Mich.) (1934).

The position of the Receiver as the instrument of the Comptroller of the Currency and the representative both of the Bank and the creditors has been recognized by this court in the case of *Kennedy, Receiver* v. *Gibson, et al* 75 U. S. 498, 19 L. Ed. 476 (1869). It was specifically stated in that case that when the receiver of an insolvent national bank sues in his own name it is not necessary for him to

make either the creditors or the association a party to the suit, for he represents both.

That the primary function of the receiver, as in the case of the examiners and the Comptroller, is the protection of the creditors was recognized by this court in *United States* v. *Weitzel,* 246 U. S. 533, 541-542, 62 L. Ed. 872 (1918), wherein it was held that a receiver is an officer of the United States appointed by the Comptroller of the Currency when the condition of a national bank or its practices make intervention by the government necessary for the protection of its creditors.

To perform his functions of supervision, representation and protection, the Comptroller is given broad powers as was recognized in the cases of *Bushnell* v. *Leland,* 164 U. S. 684, 685, 41 L. Ed. 598, (1897), *Easton* v. *Iowa,* 188 U. S. 220, 238, 47 L. Ed. 452 (1903) and *Thomas* v. *Taylor,* 224 U. S. 73, 82, 56 L. Ed. 673 (1912).

The foundation of the national banking system is public confidence and to be effective in the performance of its public functions it must invite and receive the deposits of the people. Therefore, when the Comptroller of the Currency permits a national bank to remain open he invites members of the public to deposit their funds with the bank, to leave funds on deposit and to otherwise conduct business with the bank. The mere fact that a national bank is open is a continuing invitation to the public to rely on its soundness and an assurance that the Comptroller and his examiners deem the bank sound and honestly administered. The depositors have no rights respecting the operation or management of a national bank and have no means of knowing the soundness of the bank except by reliance upon the statements publicly issued from time to time by the bank as prescribed by the Comptroller of the Currency and upon other actions taken by the Comptroller for their protection. The stockholders of the bank, as its proprietors, have the usual rights and privileges, with respect to the inspection of the books and records of the banks, which are accorded to

stockholders of private corporations. *Guthrie* v. *Harkness*, 199 U. S. 148, 50 L. Ed. 130 (1905). But depositors and other creditors, though vitally interested in the safety of the institution, have no such rights. All such protective activities are denied to the depositors and creditors and lodged by law in the hands of the Comptroller. See *Rasmussen* v. *Hamilton*, 71 F. (2d) 212 (Ct. of App. D. C.) (1934). It seems clear that unless matters relied on by the examiners and through them by the Comptroller are *ipso facto* relied on by the depositors and other creditors who cannot act for themselves the purpose of the protective provisions of the National Bank Act would be largely defeated.

Thus the law creating, regulating and protecting the national banking system recognizes the fact that there are three separate groups or entities concerned in the business of public banking, namely, the banking corporations, their stockholders, and depositors, and other creditors as represented by the government through the Comptroller of the Currency, his examiners and receivers. This thought was well expressed in the case of *United States National Bank of La Grande* v. *Pole*, 2 F. Supp. 153, (D. C. Ore.) (1932), where the court commented that the statutory provisions for the ultimate protection of the depositors are founded in a sound public policy and stated at page 157:

> "The charter contract is tripartite, including the corporation, the stockholders, and the sovereign in the interest of the depositors. All the laws relating to the national banking associations are inherently a part and parcel of this contract."

B.

National bank examiners and the Comptroller of the Currency, in the performance of their duty to protect the depositors and creditors of the bank, relied upon the validity of the note-guaranty bonds.

The report of the Master included findings of fact to the effect that subsequent to the giving of the Cronin bond three bank examinations were made by the national bank examiners acting under the Comptroller of the Currency. The first examination was on October 6 and 7, 1930. The Cronin bond was examined, and the examiner concluded that the Cronin loan was not slow, doubtful, or a loss (these being the three classifications for undesirable paper), and so reported. (R. 54.) The second examination was conducted February 22 to March 3, 1931. The Cronin and Westchester bonds were examined, and the examiner concluded that these two loans were not slow, doubtful, or a loss, and so reported. (R. 54.) The third examination was conducted between August 20 and September 5, 1931. All four bonds were examined and the loans were not criticized in the report, with the exception of the Stone loan which was classified as "slow" because it appeared that the bank might not be paid until the bond expired. (R. 54.) In the course of this latter examination the examiner talked with Cliff and was assured that the bonds were all right. He also checked the authority of the Surety Company to do business in Massachusetts and Cliff's qualification as an agent and found both satisfactory (R. 55).

Certainly there was no negligence on the part of the examiners in arriving at their conclusions respecting the validity of these bonds. They made every reasonable check of the authority of Cliff to execute the bonds. In fact, there was no negligence on the part of the directors of the Bank, and the Master so found. (R. 53.) The directors inquired about the bonds, examined some of them, and approved of the loans in reliance thereon. On one occasion, in connec-

tion with the renewal of the Robinson loan, a letter was written by the Vice-President of the Bank to the home office of the Surety Company, but, through the connivance of Ragan, that letter was diverted to Cliff who replied on stationery of the Surety Company informing the Bank that since he was the manager of the Boston branch office of the Surety Company the letter had been sent to him by the home office for answer and that inasmuch as he handled all New England business of the Surety Company all questions should thereafter be referred to him. (R. 129.)

On three occasions, namely, April 3, 1931, July 10, 1931, and October 14, 1931, the cashier of the Bank published in the Boston Transcript a statement of condition of the Bank given pursuant to a "call" from the Comptroller of the Currency (R. 58.) Publication of the statement given in response to the call is required by law (12 U. S. C. 161, see Appendix p. 94). Each statement contained a single figure showing the total amount of "loans and discounts". In each of these totals the amounts of such of the Cronin, Westchester, Stone, and Robinson notes as were at the time outstanding were carried at face value. The Comptroller of the Currency, through the aforementioned examinations by the national bank examiner and the reports based thereon as well as the "call" reports, relied upon the validity of the note guaranty bonds securing the assets in question, and the Master so found as a matter of fact. (R. 58.)

As stated by the Master, the knowledge on the part of the Comptroller and his examiners of the existence of the uncollectibility of some $120,000.00 of its loans (over 10 per cent of its capital) would have been the occasion for whatever vigorous action for the protection of old depositors and the prevention of loss to potential new depositors the Comptroller could take. The Master found that the failure of the Comptroller of the Currency, who was thus deceived and thus precluded from exercising his legal and practical authority, to require the actual infirmities in the loans here in question to be corrected was in reliance on

the supposed validity of the bonds now in suit (R. 59). There were, of course, hundreds of thousands of dollars deposited in the Bank subsequent to the giving of the first bond and subsequent to the first examination after that bond was given, namely, October 6 and 7, 1930 (R. 54). Furthermore, it is obvious that all creditors who permitted their funds to remain on deposit in the Bank did so in the belief that the Bank was a sound and solvent institution and this belief was engendered by the fact that the Comptroller of the Currency permitted the Bank to continue operating as a going concern. The continued operation of the Bank was, in itself, an invitation to the public generally to deal with the Bank as a solvent concern. All of such depositors and creditors suffered a very substantial loss due to such reliance, as evidenced by the findings of the Master. As of December 31, 1934, the Bank owed over $3,000,000.00 to general creditors and depositors, whereas the fair value of its assets available for paying these creditors was $170,000.00. (R. 60.)

There were findings of fact by the Master to the effect that one creditor relied specifically on an examination of the assets of the bank, including the aforementioned loans, made by his own personal representative in connection with a transaction in which he subsequently became involved with the Bank. This particular reliance, however, only adds to and does not detract from the general reliance of the depositors and creditors as a group upon the validity of these note-guaranty bonds, derived through the direct reliance of the examiners and the Comptroller of the Currency upon such validity. In other words, as stated by the Master, documents upon which the examiners directly rely are *ipso facto* indirectly relied upon by the depositing public. (R. 60.)

C.

Where such reliance and loss on the part of creditors of an insolvent bank are shown, the depositors and creditors, through the medium of the receiver, can, by the vast weight of authority, invoke the doctrine of estoppel to defeat defenses such as herein asserted by the Surety Company.

Although the instant cases relate to the rights of depositors and creditors of an insolvent national bank acting through a receiver, it is pertinent to examine the decisions of both State and Federal courts in similar cases involving insolvent state banks as well as insolvent national banks because all States have banking systems in general similar in control and organization to the national banking system. For this reason, we have included in the following discussion decisions relating to state banks as well as national banks.

1. Federal Court decisions sustaining Receiver's position.

The earliest Federal case sustaining the Receiver's position is *Pauly* v. *O'Brien,* 69 Fed. 460 (C. C. Calif.) (1895). In that case it was held that the receiver of an insolvent national bank could recover on a promissory note which the maker had given to the bank in order to enable the bank to remove from its assets a note which was considered practically worthless. The court said, at p. 461:

> "It will never do for the courts to hold that the officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security, and, when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act."

The doctrine contended for by the Receiver has been upheld in the Fourth Circuit in the case of *Federal Reserve Bank* v. *Crothers,* 289 Fed. 777 (C. C. A. 4) (1923). In that case the defendant executed a note to the national bank

there involved at the solicitation of one Warburton, its president, who told the defendant that the note was to be used to take the place of an equivalent principal amount of bonds of an electric light company, held by the bank, to which the bank examiners had objected. Warburton actually used the note in substitution for the note of a third party which had been previously obtained by Warburton and used for the purpose of removing said excessive bond holdings. Crothers received no consideration for the note and there was no evidence that the bank parted with anything in exchange for the note. The Circuit Court of Appeals for the Fourth Circuit ruled that the District Court should have instructed the jury to find for the plaintiff (the receiver of the bank). Mr. Circuit Justice Taft (then Chief Justice of this Honorable Court) sat on the case in the Circuit Court of Appeals as Circuit Justice and concurred in the opinion. The court said, at p. 779:

> "Public policy requires that the maker be *estopped* from denying his liability under such circumstances." (Italics ours.)

A similar view of the law was taken by the Circuit Court of Appeals for the Fifth Circuit in the case of *Bohning v. Caldwell*, 10 F. (2d) 298 (C. C. A. 5) (1925), cert. den. 271 U. S. 663, 70 L. Ed. 1139. In this case the action was by the receiver of a national bank for the purpose of recovering the amount of a note executed by five directors of the bank for the purpose of taking up notes owned by the bank but considered worthless. Certain of the defendants set up the defense of no consideration and contended that it was not contemplated that the directors would ever have to pay the amount of the note. The court, in holding the defendants liable, said, at p. 299:

> "Furthermore, the funds derived from the discount of the note increased the assets of the bank in which they (the makers) were interested. The note imports consideration, and they are *estopped* to deny it. The

weight of authority supports this conclusion." (Italics and insert ours.)

This decision is of particular significance inasmuch as in the course of the opinion the court referred to the case of *Pauly* v. *O'Brien, supra,* as stating the sound doctrine, after having considered and referred to the line of cases typified by the case of *Peterson* v. *Tillinghast,* 192 Fed. 287 (C. C. A. 6) (1911), which was cited with approval in the court below in the instant cases as appearing to hold the contrary view.

Also, see *Utley* v. *Clarke, et al.,* 16 Fed. Supp. 435, (D. C. New York) (1936), where the court adopted the view of the law here contended for by the Receiver. In that case the plaintiff sought to recover from the receiver of an insolvent national bank certain securities, or the value thereof, which he had placed in the custody of the bank's officers for the purpose of giving them the appearance of assets of the bank. The court expressed itself as follows, on page 439:

> "While, if the bank were solvent and a going concern, plaintiff might recover, he cannot recover when he has been party to a deception upon the depositors and creditors of the bank and upon the Comptroller of the Currency when the bank becomes insolvent and his securities are taken by the receiver. He is *estopped* from asserting his claim as against depositors and other creditors." (Italics ours.)

The decision recognizes that the real parties in interest are the depositors and creditors, although the receiver is the party to the suit in their interests.

2. State Court decisions sustaining Receiver's position.

The contention of the Receiver is sustained by decisions of the highest courts of a majority of the States as is disclosed by the following:

ALABAMA:

See *Day* v. *Farmers' & Merchants' Bank,* 229 Ala. 372, 376-377, 157 So. 439, 443-444 (1934).

COLORADO:

Murphy, Receiver v. Gumaer, 18 Colo. App. 183, 70 Pac. 800, 802-803 (1902).

Rogers v. *First State Bank,* 79 Colo. 84, 243 P. 637 (1926).

FLORIDA:

Ashley v. *Rowe,* 101 Fla. 110, 133 So. 551, 552 (1931).

ILLINOIS:

Golden v. *Cervenka,* 278 Ill. 409, 116 N. E. 273, 282, 283, (1917);

Niblack v. *Farley,* 286 Ill. 536, 122 N. E. 160 (1919);

Boller v. *Field,* 260 Ill. App. 488, 492 (1931);

Nelson v. *Colegrove,* 265 Ill. App. 488 (1932).

INDIANA:

Iglehart v. *Todd,* 203 Ind. 427, 178 N. E. 685, (1931).

KANSAS:

German-American State Bank v. *Watson,* 99 Kan. 686, 163 Pac. 637 (1917);

Cedar State Bank v. Olson, 116 Kan. 320, 226 Pac. 995, 997 (1924);

Hayes v. *Addy,* 139 Kan. 481, 32 Pac. (2d) 243, (1934);

Bell v. *Johnson,* 142 Kan. 360, 46 Pac. (2d) 886, (1935).

KENTUCKY:

Denny v. *Fishter,* 238 Ky. 127, 36 S. W. (2d) 864 (1931).

MARYLAND:

See New v. *Page,* 144 Md. 606, 125 Atl. 403, 404 (1924).

MASSACHUSETTS:

Prudential Trust Co. v. Moore, 245 Mass. 311, 139 N. E. 645, 647 (1923).

MINNESOTA:

Skordal v. *Stanton,* 89 Minn. 511, 95 N. W. 449 (1903);

German-American Finance Corp. v. Merchants & Mfrs. Bank, 177 Minn. 529, 225 N. W. 891, 893 (1929).

MISSOURI:

Third National Bank of St. Louis v. *Reichert*, 101 Mo. App. 242, 73 S. W. 893, 896 (1903);

Bank of Slater v. *Union Station Bank*, 283 Mo. 308 at p. 320, 222 S. W. 993 (1920).

MONTANA:

State Bank of Moore v. *Forsyth*, 41 Mont. 249, 108 Pac. 914, 919 (1910).

NEBRASKA:

Harrington v. *Connor*, 51 Neb. 214, 70 N. W. 911 (1912).

NEW JERSEY:

See *Schmid* v. *Haines*, 115 N. J. L. 271, 274, 178 Atl. 801, 803 (1925).

NEW YORK:

Hurd v. Kelley, 78 N. Y. 588 (1879);

Best v. Thiel, 79 N. Y. 15 (1879);

Sickles v. *Herold*, 32 N. Y. S. 1083 (1895);

Bay Parkway Nat. Bank v. Shalom, 270 N. Y. 172, 200 N. E. 685, 687 (1936);

Mount Vernon Trust Co. v. *Bergoff*, 272 N. Y. 192, 5 N. E. (2d) 196, (1936).

NORTH DAKOTA:

Vallely v. *Devaney*, 49 N. Dak. 1107, 194 N. W. 903, (1923);

Peterson v. *Baird*, 63 N. Dak. 604, 249 N. W. 690 (1933).

OHIO:

State, ex. rel, Lattanner v. *Hills*, 94 Ohio St. 171, 113 N. E. 1045, 1047 (1916).

OKLAHOMA:

First National Bank v. *Boxley*, 129 Okla. 159, 264 Pac. 184, 187 (1927).

OREGON:

Putnam v. *Chase*, 106 Ore. 440, 212 Pac. 365 (1923).

PENNSYLVANIA:

State Bank of Pittsburg v. *Kirk*, 216 Pa. 452, 65 Atl. 932, (1907);

Lyons v. Benney, 230 Pa. 117, 79 Atl. 250, 251, (1911);

Warren National Bank v. *Jamieson*, 301 Pa. 45, 151 Atl. 672, (1930).

SOUTH CAROLINA:

Arthur v. Brown, 91 S. Car. 316, 74 S. E. 652, 654 (1912).

TEXAS:

Shaw v. Borchers, 46 S. W. (2d) 967, 969, 970, (Tex, Civ. App.) (1930);

Brand v. *Korth*, 99 S. W. (2d) 285 (Texas 1936);

Federal-American National Bank v. Scott, 103 S. W. (2d) 1064 (Tex. Civ. App. 1937).

UTAH:

See *Riches* v. *Hadlock*, 80 Utah 265, 288, 15 P. (2d) 283, 292 (1932).

VERMONT:

West Rutland Tr. Co. v. *Houston*, 104 Vt. 204; 158 Atl. 69, 71-72 (1932).

VIRGINIA:

See *Webb* v. *Pleasants*, 144 Va. 516, 519; 132 S. E. 175, 176 (1926).

WASHINGTON:

Moore v. *Kildall*, 111 Wash. 504; 191 Pac. 394 (1920).

WISCONSIN:

Schwenker v. *Teasdale*, 206 Wisc. 275, 239 N. W. 434, 437-438 (1931).

See also:

Allen v. *Hay*, 64 Can. S. C. 76; 69 Dom. L. R. 193 (1922); (Note) 38 Harvard Law Review 239; (Anno.) 64 A. L. R. 595, 601-605.

Those cases which appear in bold type contain particularly clear and persuasive statements of the rule. In order to avoid cumulative repetition we will not attempt to analyze and discuss each of the aforementioned decisions but

will confine our remarks to only a few typical examples of the decisions.

In the case of *Iglehart* v. *Todd*, 203 Ind. 427 178 N. E. 685, the president of a state bank induced three of his friends to execute promissory notes payable to the bank for which no consideration was paid. The bank had suffered a theft of certain bonds causing a depletion of its capital and the state bank examiners had insisted that the impairment of capital be corrected. The president of the bank appears not to have explained to the three makers of the notes the full circumstances which prompted him to ask for the notes and appears to have given assurances to the several makers that in signing and delivering the notes they were not incurring any personal liability. It did not appear that the makers knew or suspected that their notes were to be used in connection with any deception of the bank examiners. The president gave to each of the makers his personal guarantee against loss. After obtaining the notes the president took $100,000 of municipal bonds owned by the bank, deposited them with the bank examiner as security for the depositors under an escrow agreement, and caused entries to be made on the books of the bank by which the notes in question supplanted the escrowed bonds so that no depletion of assets was apparent on the books of the bank. The escrowed bonds were accepted by the Commissioner of Banks as a temporary expedient pending the issue of additional stock to restore the depleted capital resulting from the theft. The bank examiners and the Commissioner of Banks relied upon the notes as valid assets of the bank and, supposing that the stability of the bank had been restored, permitted it to remain open for a considerable period until the examiners discovered that the notes were in the nature of accommodation notes and reported the fact to the Commissioner, whereupon the bank was closed and a receiver appointed therefor.

The makers of the notes brought suits against the receiver seeking the surrender and cancellation of the notes

on the ground that they were not enforceable because of lack of consideration. The receiver filed cross actions seeking to recover on the notes. The Supreme Court of Indiana wrote an exhaustive opinion to the effect that the makers of the notes were *estopped* to deny their liability on the ground that to sustain the defense of lack of consideration would have the effect of endorsing a fraud upon the public, the depositors and other creditors of the bank. In the course of its opinion the court stated, at 178 N. E. 690:

> "The banking business is one of public concern, and it is regulated and examined by a department of the state government in order that the public may be protected and not be misled. Those who participate in a transaction by which the assets of a bank are given a favorable appearance for the purpose of examination, but less favorable for purposes of liability or enforcement, are participating in a transaction which is fraudulent as to the public, and as to the creditors and depositors, in whose behalf the regulation of banks is imposed, . . .
>
> "Where one by giving accommodation notes is instrumental in clothing a bank with such an appearance of genuine assets as induces a bank examiner to regard it as sound, and to permit it to continue in business, and where in its published reports such person's notes figured as resources, and the public relies thereon and intrusts the bank with its money, the maker of the note is *estopped,* as against the creditors, to say that his notes were other than what on their face they purported to be, or that the appearance which was given to the books of the bank was not genuine. . . . If, by reliance upon such securities, depositors were induced to make and leave deposits in the bank, then upon the clearest principles of justice and morality the maker of the securities should be *estopped* from denying their validity. . . ." (Italics ours.)

The decision further stresses the point that notes given under such circumstances are not "accommodation" notes and that the immunity which the law gives to an accommo-

dation maker in the absence of the negotiation of his note to a third party cannot be invoked to relieve the maker from liability after the bank becomes insolvent, since upon the insolvency the rights of the depositors and creditors intervene to raise the estoppel. A review of this case appearing in 45 Harvard Law Review, page 926, points out that it follows *Denny* v. *Fishter,* 238 Ky. 127 (1931), in holding the maker of an instrument liable upon his promise even though he was wholly innocent of any intentional wrong-doing.

In *Hurd* v. *Kelley,* 78 N. Y. 588 (1879), an action was brought by the receiver of a state bank upon a bond executed by the defendant and other obligors named therein. It appears that the assets of the bank had become impaired in a substantial amount. The bond was executed for the purpose of being exhibited to the banking department of the State as an asset of the bank so that the bank might be enabled to continue its business. It was contended by the defendant that the bond was void for want of consideration but the court held this position was untenable because the bank did continue to operate as a going concern for almost two years after the bond was executed and that:

> "The continuance of its business and the incurring of new obligations by the bank, incident to such continuance, was a good consideration." (78 N. Y. at 596.)

The defendant attempted to defend on the ground that there was a fraudulent concealment of the condition of the bank by the person who solicited the defendant to sign the bond. The court, however, held this defense invalid because the defendant knew that the bond was to be treated as an asset and was to be used for the purpose of enabling the bank to continue its business, and that new obligations to depositors would be entered into on the faith of the supposed solvency of the institution. In this connection the court stated, at page 597:

> "Under such circumstances it would be gross injustice to permit the defendant, after having aided the bank to procure credit with the community, to avoid, as against depositors and creditors, the payment of his bond on the allegation that the exact condition of the bank was not disclosed to him, or that it was much worse than was represented. The dealings between him and the officials of the bank, at whose request he signed the bond, ought not, in justice, to be allowed to affect the security given by him for the protection of those dealing with the bank and who must be presumed to have relied thereon in their dealings."

This case was soon followed by *Best* v. *Thiel*, 79 N. Y. 15 (1879). In that case the receiver of a state bank sought to foreclose a morgtage which had been given to the bank to conceal a deficiency in the assets of the bank and to enable it to continue its business. The defendant pleaded a lack of consideration. The court stated at page 18:

> "It was reported to the banking department as a portion of the assets and was in effect represented to the depositors of the bank as a portion of the assets, and all this was done by the defendant and with his knowledge and assent. It was in consequence of this and other securities given by other trustees, that the superintendent of the banking department, acting officially for the public and all creditors of the bank, permitted the bank to continue its business. It was in reliance upon this and the other securities given, that depositors were induced to make and leave deposits in the bank; and hence, upon the clearest principles of justice and morality, the defendant should be *estopped* from denying the validity of this mortgage." (Italics ours.)

In *Murphy* v. *Gumaer*, 18 Colo. App. 183 70 P. 800 (1902), an action had been instituted by the receiver of an insolvent national bank upon a note. One Blake owned a majority of the stock of the bank. The bank had made excessive loans to Blake and companies controlled by him and overdrafts had been permitted to the same parties. In order to con-

ceal the loans and overdrafts from the bank examiners, Blake induced the defendant to sign a note payable to the bank and several other notes payable to Blake's companies. The latter notes were indorsed by the companies and discounted by the bank and the proceeds were used for the above-mentioned purpose. Blake disclosed to the defendant his purpose and the entire situation and promised that the defendant would not be held liable on the notes. In holding the defendant liable the court stated, at 70 P. 802:

> "We do not think he is in a position to say that the books did not speak the truth. This controversy is not between the bank and the defendant. The suit was brought by the receiver, and he is a representative of the creditors of the bank. . . . In accordance with the provision of the national banking act, it is his duty to cause debts due to the bank to be collected, and its property to be sold, and, if necessary for the payment of the debts due from it, to enforce the individual liability of the shareholders. He pays over the money he receives to the treasurer of the United States, subject to the order of the comptroller; and the latter, after full provision has been made for refunding any deficiency in redeeming the notes of the bank, makes, from time to time, ratable dividends on the claims of creditors which have been proven; and what is left, if anything, is paid over to the shareholders. That the bank had creditors,—that it received deposits and did a general banking business,—the evidence abundantly shows. The defendant was instrumental in clothing the bank with such an appearance of genuine assets as induced the comptroller to regard it as sound, and to suffer it to continue in business. In the reports which were transmitted to him these notes figured as resources, and the public had a right to rely on the reports when they were published. If the defendant was not liable on the notes, the comptroller was deceived, and the persons who dealt with the bank, and intrusted it with their money, were also deceived. However valid the defense might be if the bank were plaintiff, the defendant, who, when he gave the notes, knew exactly the purpose for which they were to be used, is *estopped* to

> say, as against the creditors, that they were other than what, on their face, they purported to be, or that the appearance which was given to the books was not genuine." (Italics ours.)

The Supreme Court of Pennsylvania took a similar view in *Lyons* v. *Benney,* 230 Pa. 117 (1911). In that case, the receiver of an insolvent national bank instituted suit against the maker of a note given to the bank without consideration for the purpose of substituting it for the note of a third party which had been criticized by the bank examiner. The defendant had executed the note after an agreement had been entered into with officers of the bank to the effect that he would not be liable thereon. In holding the defendant liable, the court acknowledged the general rule that the receiver of an insolvent corporation has no greater rights than those possessed by the corporation itself and that a defendant in a suit brought by such a receiver may take advantage of any defense that might have been made if the suit had been brought by the corporation before its insolvency, but then forcefully commented at page 119:

> " . . . it is equally true that when an act has been done in fraud of the rights of the creditors of the insolvent corporation, *the receiver may sue for their benefit, even though the defense set up might be valid as against the corporation itself.* In such a case he may maintain an action which the corporation itself could not." (Italics ours.)

The court further commented on page 120:

> ". . . this appellant was a party to a scheme of the officers of the bank to enable them to make a deceptive and fraudulent showing of assets, and as the fraud was perpetrated upon the creditors, now represented by the bank's receiver, he can maintain an action on the note for thier benefit."

and again on page 121:

> " . . . one who voluntarily gives his obligation to a bank for the purpose of taking up another obligation,

and of being exhibited as one of its assets to a supervising officer of the government having supervision and control of its affairs, is *estopped* to deny want of consideration upon the insolvency of the bank when a receiver brings an action upon the note for the benefit of the creditors of the institution." (Italics ours.)

The Supreme Judicial Court of Massachusetts has squarely adopted the doctrine here contended for. In *Prudential Trust Co.* v. *Moore et al.*, 245 Mass. 311, 139 N. E. 645 (1923), the receiver of an insolvent state bank sued upon certain notes executed by directors of the bank for the purpose of concealing various excessive loans and overdrafts. The notes had been executed at the request of the president of the bank who disclosed the purpose for which the notes would be used but concealed the fact that the maker of the excessive loans was on the verge of insolvency. The defendants pleaded lack of consideration and misrepresentation on the part of the president of the bank. The defendants were held liable to the receiver of the bank. The court, after disposing of the defense that the president of the bank had assured the defendants that they would not be liable on the note, said on page 316:

"Further, a short answer to both defenses is that the defendants are *estopped* from denying the legal validity of these notes, which the bank commissioner is now attempting to collect for the benefit of creditors of the bank. They knew when they signed the notes that the assets of the bank were materially impaired by illegal loans to the dredging company; and that the proceeds of the notes in suit were to be used to prevent the closing of the bank. *They knew that these new assets would enable the bank to continue doing business, retain deposits of existing customers, and presumably obtain new deposits and credits.* To permit the defendants, who by these notes enabled the bank to appear to the public as a solvent concern, now to plead the invalidity of the very securities by which they induced others to make and leave deposits with the bank, would be unjust and fraudulent; . . ." (Italics ours.)

Although in the cases at bar it is the receiver of an insolvent national bank who brings the actions for the benefit of the depositors and creditors of the bank, there is substantial authority in support of the proposition that in cases of this kind where apparent obligations have been given the appearance of validity for the express purpose of deceiving the banking authorities, and through them the depositors and creditors, the bank itself could invoke the doctrine of estoppel to defeat defenses such as are attempted to be set up in the instant cases. See *Bay Parkway Natl. Bank* v. *Shalon*, 270 N. Y. 172, 200 N. E. 685, (1936); *Mount Vernon Trust Co.* v. *Bergoff*, 272 N. Y. 192, 5 N. E. (2d) 196, (1936); *Tarrytown Nat'l Bank & Trust Co.* v. *MacMahon*, 293, N. Y. S. 513 (1937); *Bangor Trust Co.* v. *Christine*, 297 Pa. 64, 146 Atl. 545 (1929); *Rogers* v. *First State Bank*, 79 Colo. 84, 243 Pac. 637, (1926); *Cedar State Bank* v. *Olson*, 116 Kan. 320, 226 P. 995 (1924).

3. Decisions Relied Upon by Respondents and the Courts Below.

The decision in the case of *Rankin, Receiver*, v. *City National Bank*, 208 U. S. 541, 52 L. Ed. 610 (1908), was practically the sole basis of the decision of the United States District Court overruling the conclusions of the Master in the cases at bar and was the principal case relied upon by the Circuit Court of Appeals in affirming the decision of the United States District Court. In view of this fact, we have undertaken to examine and analyze the record and briefs submitted to this Court by counsel for the respective litigants in the *Rankin* case in order to show the factual situation upon which the decision of this Court was based and to establish that the opinion therein is inapplicable to the cases at bar.

In our statement of the facts involved in the *Rankin* case we will refer to the record in that case as "(*Rankin* Record ....)".

In that case a national bank examiner had criticized three loans of the Capitol National Bank of Guthrie, Oklahoma, hereinafter referred to as the Guthrie bank. Two of these notes had been written and signed by Charles E. Billingsley as treasurer and vice-president of the corporate makers (*Rankin* Record 18), but Billingsley was not personally liable upon them (208 U. S. 541, 543).

In order to take up these criticized notes an arrangement was made by Billingsley, who was president of the Guthrie bank, with the City National Bank of Kansas City, Missouri, whereby Billingsley gave to the City National Bank his personal note in the amount of $30,000 on September 9, 1903 (*Rankin* Record 16), under an agreement (signed by him as president of the Guthrie Bank) that the amount of the loan would remain on deposit with the City National Bank until the note was paid and that the City National Bank should have the right to charge the note against the account at any time (*Rankin* Record 16). The amount of the $30,000 loan on the Billingsley note was first credited to a personal account of Billingsley in the City National Bank (*Rankin* Record 19). Billingsley gave to the Guthrie bank his personal check for $30,000 drawn on the City National Bank (*Rankin* Record 17). The amount of that check was credited by the Guthrie bank to Billingsley's personal account in the Guthrie bank (*Rankin* Record 17) and then sent on to the City National Bank where it was honored and charged against Billingsley's account (*Rankin* Record 19) and credited to the Guthrie bank account. However, later, on the same day, the officer of the City National Bank who had entered into the arrangement with Billingsley became aware of the manner in which the transaction had been handled and, in accordance with his understanding with Billingsley had the entries reversed so that a "special" account was established on the books of the City National Bank in favor of the Guthrie bank with a credit in the amount of $30,000 and a charge in a like amount was made to the Guthrie bank's "general" account in the City Na-

tional Bank (*Rankin* Record 19). By this procedure an additional paper credit of 30,000 was provided wherewith Billingsley, or the Guthrie bank, could purport to remove the three criticized loans in the approximate amount of $30,000 from the Guthrie bank's assets.

To carry out the plan, Billingsley gave to the Guthrie bank his personal check drawn against his personal account in the Guthrie bank in the amount of $30,000; the amount of this check was charged against his personal account and credited to bills receivable and the three criticized notes were then purportedly taken out of the assets. On September 9, 1903, Billingsley addressed a letter to the bank examiner, advising him that he had had paid to the bank the three criticized loans (*Rankin* Record 18). There is nothing in the record to show whether the examiner received this letter or whether he ever relied thereon.

On November 9, 1903, the City National Bank charged Billingsley's note of $30,000 against the "special" account of the Guthrie National Bank. However, shortly thereafter the transaction was virtually renewed but in the amount of $25,000.00 rather than $30,000 (*Rankin* Record 21-26), and the $25,000 was credited by the City National Bank to the Guthrie bank's "special" account on December 7, 1903 (*Rankin* Record 24). The note used in this latter transaction was charged by the City National Bank against the "special" account of the Guthrie bank at 10:00 A. M., April 4, 1904, and the cancelled note was returned to Billingsley (*Rankin* Record 27). At 2:00 P. M., on the same day the Guthrie bank was closed because of insolvency. (*Rankin* Record 28.)

All during the period covered by these transactions the Guthrie bank's books showed only one account in the City National Bank, whereas the City National Bank's books showed two account in the name of the Guthrie bank, a "general" account and a "special" account (*Rankin* Record 26). Monthly statements were rendered to the Guthrie bank by the City National Bank showing the status of both

accounts. At the time Billingsley's $25,000 note was charged against the "special" account the City National Bank had no knowledge whatsoever of the Guthrie bank's failing condition. (*Rankin* Record 28.)

The findings of fact of the District Judge definitely show that it was customary for the Guthrie bank to borrow money in either of two ways: (1) By issuing its certificates of deposit payable either to Charles E. Billingsley or others and causing such certificates of deposit to be negotiated and delivered to banks, upon negotiation of which credit would be taken in the account current in the Guthrie bank with the bank from which such loan was made; or (2) By issuing the notes of the bank and crediting the proceeds to the personal account of Charles E. Billingsley in the Guthrie bank, upon which as payments were made upon such loans so credited to such account, checks would be made, reciting therein payment, or part payment, of the particular loan for which the check was drawn, and such checks were signed either by Billingsley or in the name of Billingsley by the cashier. The personal account of Billingsley was also used for his private deposits and personal checks. (*Rankin* Record 29.)

Upon the aforementioned facts the District Judge in a memorandum opinion (*Rankin* Record 59) held that the two note transactions were "bank" transactions and not "personal" transactions of Billingsley. He further held that the transactions were for the bank's benefit and not for Billingsley's benefit and that the contract between the two banks was valid. The District Judge specifically commented that in answer to a question by the court, counsel for both sides stated that no contention was made that the contract was illegal because it was one which would enable the Guthrie bank or Billingsley, its president, to make a false showing of the condition of the bank to the bank examiner or to the Comptroller.

The case was taken to the Circuit Court of Appeals for the Eighth Circuit, where in an opinion reported in 144 Fed. 587, under the title of *Cherry* v. *Nat. Bank*, the decision of the District Court was upheld.

Thereafter the case was taken to this Court and it is interesting to note the arguments presented by counsel for the respective litigants. In the brief filed in behalf of Rankin as Receiver of the Guthrie bank, the argument was based almost entirely upon the contentions that the notes executed by Billingsley evidenced his own individual obligations and not those of the bank, that in borrowing the $30,000 from the City National Bank, Billingsley had undertaken to pledge the deposit of the Guthrie bank as collateral security for his loan, that Billingsley had no authority to make such a pledge and that his act was not and could not be ratified by the bank because a national bank cannot hypothecate its funds as collateral security to the debt of another.

The contention of the counsel for Rankin is summarized in the first three paragraphs of their brief under the caption **"Argument"** as follows:

> "The real controversy is whether or not the loans evidenced by Billingsley's notes were his individual obligations or bank transactions.
>
> "If they were bank transactions, made for the benefit of the bank, and if the bank received and appropriated the proceeds thereof, it is our opinion that the judgment of the lower court should be affirmed.
>
> "If, on the contrary, they were not for the benefit of the bank, and if the bank did not get the proceeds, the judgment should be reversed."

The arguments contained in the brief submitted by counsel for the Defendant in Error are summarized on page 21 thereof. It is there contended that the notes and special deposits were bank transactions and not personal transactions between Billingsley and the City National Bank, that the Guthrie bank recognized and ratified the transactions and contracts of Billingsley with the City National Bank as made for its use and benefit, and that the transactions and contracts were within the power of the Guthrie bank and within the authority of its president since the

money was borrowed for the use of the Guthrie bank. A considerable portion of the brief deals with the power of the bank as such to borrow money and the power of bank officers to borrow in behalf of the bank.

Upon consideration of the facts set forth in the record and the contentions made in the briefs filed in behalf of the litigants, this Court affirmed the decision of the Circuit Court of Appeals and in so doing stated (208 U. S. 541, 546):

> "If the Guthrie bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank."

Much has been made of this language by the Surety Company in the lower courts in the cases at bar. Both the Circuit Court of Appeals below and other Federal courts have apparently considered the aforequoted language as establishing a general rule that a receiver of an insolvent bank stands no better than the bank itself. The foregoing review of the arguments presented to this Court in the *Rankin* case conclusively disposes of any contention that it was the intention of this Court to establish any such rule by the aforesaid language. At no point in either brief was it argued pro or con that a receiver of an insolvent national bank has rights other than those which the bank had while it was operating as a going concern. The whole argument of the receiver in that case was as aforenoted that the notes executed by Billingsley were for his own accommodation and that the bank did not in fact and could not in law ratify the attempted pledge of the Guthrie bank's deposit in the City National Bank to secure the personal obligation of Billingsley. The decision of this court virtually determined that the transaction was for the benefit of the bank rather than for the benefit of Billingsley, that the Guthrie bank's deposit account in the City National Bank had been used to pay its own liability and that, therefore, there could be no recovery.

At the end of the opinion Mr. Justice Holmes commented on the fact that neither party contended that the contract was illegal and then suggested that even if the contract relating to the use of the "special" deposit to pay the Billingsley note had been illegal, the receiver would have stood no better. It is not wholly clear just what Mr. Justice Holmes had in mind in making this suggestion by way of dictum, but if he meant that the receiver must take the contract between the two banks just as it was made and subject to all burdens or conditions, then such dictum is not in accord with the rules of law respecting receivers of national banks as subsequently developed and recently declared by this Court in the cases of *Texas and Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, (supra); *City of Marion* v. *Sneeden*, 291 U. S. 262 (supra); and *Awotin* v. *Atlas Exchange National Bank*, 295 U. S. 209.

Neither of the briefs urged the point relied upon in the instant cases of an estoppel arising out of a reliance by the bank examiners and the Comptroller upon the deposit account of the Guthrie bank in the City bank being unencumbered. The receiver was content to rest his position solely on the contention that Billingsley was acting personally and not as agent of or for the benefit of the Guthrie bank. This issue of fact was decided against him.

On the facts set forth in the record the estoppel doctrine here urged could not have been raised because a reliance by either bank examiner or the Comptroller was not proven and because there was no showing that the depositors and other creditors suffered any loss whatsoever by reason of any reliance on the unencumbered status of the Guthrie bank's deposit account in the City bank; as a matter of fact, the loss, if any, was sustained by the making of the excessive loans by the Guthrie bank prior to its insolvency and not as a result of the transaction whereby the said excessive loans were purportedly removed from the assets of the bank. It is significant therefore, in that case, that no one was injured by the transaction with the City bank be-

cause the notes representing the excessive loans which the examiner had criticized remained the property of the Guthrie bank (144 Fed. 593 and 208 U. S. 545). Furthermore, the estoppel doctrine here urged could probably not have been raised in that case because the record did not disclose that the credit supplied by the City bank in any way operated to keep the bank open for any period of time with consequent loss to depositors and other creditors. Therefore, it cannot be presumed that this Court, in rendering its decision in the *Rankin* case, had in mind the doctrine of estoppel which we are urging in the instant cases, when that doctrine was neither invoked by the litigants nor even mentioned in the briefs submitted to this Court by their respective counsel.

It is submitted, therefore, that the *Rankin* case is not in any way comparable with or applicable to the instant cases, because of the differences in the facts and in the legal principles upon which the parties litigant have conceived their respective rights and defenses to rest, and that it did not lay down any general rule to the effect that a receiver of an insolvent national bank never has any different or greater rights than the bank itself.

In addition to the *Rankin* case, the Circuit Court of Appeals below cited the following cases as authority for the proposition therein laid down that the receiver should not recover in the instant cases because the bank could not have recovered and the receiver stands no better than the bank itself; *Cutler* v. *Fry*, 240 Fed. 238, (D. C. Kan. 1915); *Yates Center National Bank* v. *Schaede*, 240 Fed. 240, (D. C. Kan. 1915); *Yates Center Nat. Bank* v. *Lauber*, 240 Fed. 237, (D. C. Kan. 1915). These cases were all decided by the same court on the same day and appear to rest upon the court's interpretation of the case of *Rankin* v. *City National Bank, supra*, to the effect that a receiver of an insolvent national bank never stands better than the bank itself. Judge Pollock, who wrote the opinions, expressed reluctance that he must come to such a conclusion. He recognized the exist-

ance of the contrary doctrine as laid down in the case of *Pauly* v. *O'Brien*, 69 Fed. 460, but appears to have felt compelled to deny the receiver the right to recover because of the holding in the *Rankin* case. The rationale of Judge Pollock's decisions appears to be that a receiver cannot have the benefit of a promise contained in a note without assuming the burden of the bank's counter-promise that the note will not be enforced. Since the decisions in these three District Court cases, however, this Court has decided that a national bank itself or its receiver may after its insolvency enjoy the benefits of a contract without assuming its burdens. See *Awotin* v. *Atlas Exchange National Bank*, 295 U. S. 209, 79 L. Ed. 1393 (1935); *Texas & Pac. R. Co.* v. *Pottorff, Receiver*, 291 U. S. 245, 78 L. Ed. 777 (1934); and *City of Marion* v. *Sneeden, Receiver*, 291 U. S. 262, 78 L. Ed. 787, (1934).

The case of *Skud* v. *Tillinghast, Receiver*, 195 Fed. 1 (C. C. A. 6th) (1912) also cited by the Circuit Court of Appeals below, likewise applied what we contend to be an erroneous construction of the language contained in *Rankin* v. *City National Bank, supra.*

The case of *Peterson* v. *Tillinghast*, 192 Fed. 287 (C. C. A. 6th) (1911) was also cited by the Circuit Court of Appeals below. In that case Peterson had given his note, payable to the bank, at the request of an officer of the bank upon an express understanding that it was given for the accommodation of the bank and upon an express agreement that the bank would provide for its payment and never call upon the maker for payment. The case was tried before a jury in the United States District Court and a verdict ordered for the plaintiff (the receiver of the defunct bank). The Circuit Court of Appeals, after commenting on the *Rankin* case, used the following language (p. 292):—

> "The infirmity of the opinion below was in treating Peterson's knowledge of the proposed discount of the note as conclusive evidence of an intent that the note should be used for an illegal purpose. If it can be said

under the decision in the Rankin case that the knowledge so imputed to Peterson would render him liable on the note, we think the question of the existence of such knowledge was one of fact for submission to the jury under appropriate instructions. The rules of estoppel urged are inapplicable, because (1) the case was disposed of upon a theory alone of law forbidding Peterson to deny liability; and (2), if the case had been submitted to the jury upon questions of fact, the evidence as adduced would have been lacking in some of the essential ingredients of estoppel. Henshaw v. Bissell, 18 Wall. 255, 271, 21 L. Ed. 835; Brant v. Virginia Coal & Iron Co., 93 U. S. 326, 335, 336, 23 L. Ed. 927. As to misrepresentations made to the bank examiner and also to the Comptroller and depositors through false entries in the bank's books and newspaper publications alluded to in the opinion below, the Rankin case is in point."

The case was remanded to the District Court and a new trial ordered. It is somewhat difficult to determine from the opinion of the court what view it entertained as to the full scope and meaning of the holding in the *Rankin* case, but we submit that that court was of opinion that the *Rankin* case supported the proposition that if the maker of the note intended that it should be used to deceive the bank examiners, he would be estopped to deny his liability. It would appear that the order remanding the case for a new trial was based upon the theory that the question of Peterson's intention respecting deception of the bank examiners was a question of fact for the jury and that, therefore, the trial court had erred in ordering a verdict against him without permitting the jury to pass upon this essential question of fact.

The Circuit Court of Appeals in the instant cases also cited as authority for its ruling the cases of *Burrows* v. *Nimocks,* 35 F. (2d) 152, (C. C. A. 4th) (1929), and *Schumacher* v. *Eastern Bank and Trust Company,* 52 F. (2d) 925, (C. C. A. 4th) (1931). Both of these cases dealt with the question of whether a receiver of a national bank was

bound by an agreement with a depositor, whereby the bank pledged collateral to secure a loan or deposit. In the *Schumacher* case the court found as a fact that the transaction between the defunct bank and the defendant bank involved a loan and not a deposit and held that the defunct bank had a right to pledge its assets to secure a loan. In the *Burrows* case the defunct bank had pledged certain of its assets to secure a deposit of county funds; the Court held that in so doing the officials of the defunct bank acted within their legal authority and that since the bank itself was bound by its agreement with its depositor, the receiver likewise was bound. Both of those cases were decided prior to the year 1934 when this Court decided the cases of *Texas and Pac. R. R. Co.* v. *Pottorff, supra,* and *City of Marion* v. *Sneeden, Receiver, supra,* wherein it was held that a national bank has no authority to pledge its assets to secure a deposit except to the extent specifically permitted by statute and that a receiver of a bank may re-claim collateral so pledged without authority and leave the depositor in the position of an unsecured creditor.

The case of *Keyes* v. *First National Bank of Aberdeen,* 20 F. (2d) 678, (D. C. So. Dak.) (1927), wherein it was held that the receiver of a national bank could not recover from the defendant bank the amount of its deposit accounts therein, which had been applied by the defendant bank upon notes of officers of the insolvent bank, was in reality based upon findings that a portion of the funds provided by the defendant bank on the said notes was used for the benefit of the insolvent bank, that over a long period of years the officers of the defunct bank had been authorized to use bank funds in payment of their personal obligations, and that in the vicinity wherein the banks were located it was the common practice for banks to lend money to other banks upon the individual notes of officers thereof.

There are other cases which appear to hold that in instances where the bank as a going concern could not recover upon an obligation held by it the receiver thereof cannot re-

cover, which cases were not cited by the Circuit Court of Appeals in the cases at bar. See: *Hookway* v. *First National Bank,* 36 F. (2d) 166, (C. C. A. 8th) (1929); *Andresen* v. *Kaercher,* 38 F. (2d) 462, (C. C. A. 8th) (1930); *Lensing* v. *Kayser,* 41 F. (2d) 224, (C. C .A. 5th) (1930); *Kaercher* v. *Citizens National Bank,* 57 F. (2d) 58, (C. C. A. 8th) (1932); and *Bosworth* v. *Cady,* 72 F. (2d) 62, (C. C. A. 7th) (1934). In each of these cases, the Courts fell into the error of the District Court in *Cutler* v. *Fry,* 240 Fed. 238, and *Yates Center National Bank* v. *Lauber,* 240 Fed. 237. Most of them applied an erroneous construction of the *Rankin* case and all of them failed to give any consideration whatsoever to the fact that the rights of a receiver may be derived through the creditors of an insolvent bank rather than the bank itself, in instances where the representatives of the depositors and creditors, *i. e.,* the Comptroller of the Currency and his examiners, in carrying out the duties imposed upon them by law, have relied upon the apparent validity of an obligation held by the bank, to the detriment of the creditors and depositors thereof.

Under the principles of law applied in those cases above discussed and which are relied upon by the Surety Company and were relied upon by the Circuit Court of Appeals below, an individual maker of a promissory note, given to a bank with the express intent that it should have the appearance of a sound asset of the bank and be so regarded by the bank examiners, can escape liability after the bank becomes insolvent by pleading lack of consideration even though the maker upon inquiry by the bank examiners had assured them that the note was an enforceable asset of the bank. This contention on the part of the Surety Company denies to the Comptroller and his examiners any position in the administration of the national banking system other than that of mere supervisors who represent not the creditors and depositors but only the Government itself. Thus, the Surety Company's defense rests upon the astounding proposition that the depositors and other creditors of a national bank

may be despoiled by a conspiracy, if only a single faithless bank official can be made a party to the conspiracy, and that when the Government as the guardian of the interests of the depositors steps in to salvage for the benefit of the depositors such assets as may remain after the thievery has been discovered, the conspirator whose promissory obligation was the instrument of the fraud may escape liability by showing that the obligation was not supported by any consideration moving from the bank to the promissor or that the faithless bank official agreed, purportedly on behalf of the bank, that the obligation would not be enforced against the promissor and that the obligation was to be treated as mere "window dressing" for the examiners to rely and act upon.

It is submitted that the above discussed decisions of the inferior Federal courts upon which the Surety Company relies have resulted from the error of applying rules and principles of law which were inapplicable to cases wherein insolvent banks were involved. This error appears to have arisen through a misapprehension of the scope, meaning and rationale of the *Rankin* case, *supra,* and from a failure to appreciate the special principles which govern when a national or other public banking institution becomes insolvent and the rights and interests of its depositors and creditors are in issue as distinguished from the rights and interests of the stockholders of the insolvent bank, who prior to insolvency had been its real proprietors.

On the other hand, it is submitted that the State court cases and the Federal court cases heretofore cited as being in accord with the Receiver's contention recognize the special factors which are involved in the case of an insolvent public banking institution and that while the controlling rules of law are somewhat differently stated in the several cases and in certain instances are stated differently from the manner in which they have been developed in this brief, nevertheless they all rest upon the same conception as to the governing principles of law which find their support in

considerations of equity and public policy and the application of the doctrine of equitable estoppel.

D.

The estoppel applies to prevent the Surety Company from denying the authority of its agent, Cliff, to execute the note guaranty bonds here in issue.

It is our contention that this doctrine of estoppel is available to the Receiver in the instant cases to prevent the Surety Company from denying the authority of its agent, Cliff, to execute the note-guaranty bonds which are the subject of this litigation. It is the Receiver's contention that by reason of the fact that Cliff's power of attorney included the express authority to write obligations of the type here in question and by reason of the fact that this authority was buttressed and supported by certified and authenticated duplicate originals of the powers of attorney furnished by the Surety Company for use as proof of his authority and by reason of the fact that the powers of attorney included an unrestricted ratification of whatever Cliff did within the scope of the written authority, the Surety Company is estopped to deny Cliff's authority and its own express ratification of his acts. The presence of these factors in the instant cases forbids the application of the so-called "two innocent party rule" and brings the case within another well recognized rule of law to the effect that one who has armed an agent with all the indicia of authority is estopped from denying that the agent abused this authority when innocent third parties have actually relied to their injury upon the principal's representation of authority. *National Safe Deposit etc. Co.* v. *Hibbs*, 299 U. S. 391, 57 L. Ed. 1241, (1913); *Russell* v. *American Bell Telephone Co.*, 180 Mass. 467, 62 N. E. 751 (1902); *Tower* v. *Stanley*, 220 Mass. 429, 107 N. E. 1010, (1915); *Loring* v. *Goodhue*, 259 Mass. 495, 156 N. E. 704, (1927); *Denecke* v. *West*, 184 Iowa, 600, 169 N. W. 97, (1918); *Astoria National Bank* v. *State Bank of*

Portland, 109 Ore. 699, 704, 222 Pac. 598, (1924); *Dair* v. *United States,* 83 U. S. 1, 21 L. Ed. 491, (1873); and see Sec. 261 of the *Restatement* of the *Law* of *Agency* prepared by the American Law Institute.

The Surety Company contended in the courts below that it should not be held liable because Cliff's purpose in giving the bonds with the supporting powers of attorney was to deceive the bank examiners and that in so doing he repudiated his agency relations with the Surety Company and acted solely in his own interest. This statement of the issue begs the question. The remedy here sought does not lie in tort for deceit, the rights here sought to be enforced rest upon principles of contract. The estoppel arises because the Surety Company furnished Cliff with documents sealed and authenticated, which on their face appeared to establish indisputable proof of Cliff's authority. It furnished these evidences of authority to Cliff with the express intent on the part of its directors and responsible executive officers that they should be used to satisfy all persons who might have reason to inquire as to Cliff's authority to execute promissory obligations in the name of the Surety Company that he had such authority, and Cliff used these instruments in the instant case for the exact purpose for which his principal furnished them to him. His motive in so doing is not disclosed on the record. There is no evidence that Cliff personally benefited financially or otherwise from his conduct in the premises. Add to these facts the undisputed reliance on the genuineness and validity of the bonds by the bank examiners acting in their official capacity, and by the Comptroller and the additional fact that by reason of this reliance the unsound condition of the Bank was not discovered, so that the Bank remained open and was further looted by the conspirators, and every element required to establish the estoppel contended for is present.

E.

The estoppel applies to prevent the Surety Company from asserting the defense that the secret assurances given by Ragan to Cliff to the effect that the bank would not attempt to enforce the bonds relieves the Surety Company from liability.

It is the Receiver's contention that the Surety Company is estopped to assert as defenses the secret assurances, given by Ragan to Cliff to the effect that the Bank would not attempt to enforce the bonds, and the releases executed and delivered by Ragan to Cliff; at the same time the Receiver contends that the defenses, even though asserted, are ineffective to bar recovery.

When Cliff delivered the bonds, Ragan did assure him that they would never be enforced and that they would be returned to Cliff after they had been shown to the bank examiners as evidence that the loans secured by the bonds were amply secured. No other official of the Bank knew of these agreements. Such secret agreements made by bank officials have time and again been held unenforceable as against the receiver of a bank, *German American Finance Corporation* v. *Merchants & Manufacturers Bank,* 177 Minn. 529, 225 N. W. 891, (1929); *Prudential Trust Company* v. *Moore et al.,* 245 Mass. 311, 139 N. E. 645 (1923); *German American State Bank* v. *Watson,* 99 Kans. 686, 163 Pac. 637 (1917); *Arthur* v. *Brown,* 91 S. C. 316, 321, 74 S. E. 652 (1912); and *State Bank of Pittsburgh* v. *Kirk,* 216 Pa. 452, 65 Atl. 932 (1907). See also *Tanners National Bank* v. *Dean,* 283 Mass. 151, 155, 186 N. E. 219, (1933); *Doyle* v. *Nesting,* 37 Colo. 522; 88 Pac. 862, (1906); *Fed. Reserve Bank* v. *Crothers,* 289 Fed. 777, (C. C. A. 4th, 1923); and *Richardson* v. *Harwick,* 106 U. S. 252, 27 L. Ed. 145, (1882).

This Court has recently held in the case of *Awotin* v. *Atlas Exchange National Bank,* 295 U. S. 209, 79 L. Ed. 1393 (1935), that one who buys securities from a national bank under an agreement by the bank to repurchase the same at

an agreed price cannot enforce the contract of repurchase, and that the purchaser has no remedy for a breach of the bank's contract. Speaking for the court in that case, Mr. Justice Stone used the following language at page 214:

> "The invalidity of the contract was not due to the mere absence of power in the bank to enter into it, in which case restitution, not inequitable to the bank or inimical to the public interest, might be compelled. . . . National banks are public institutions and the purpose and effect of the statute is to protect their depositors and stockholders and the public from the hazards of contingent liabilities, attendant upon the assumption by the bank of the risk of loss by its customers, resulting from the permitted dealing in securities by the bank."

This case appears to recognize the principle that in determining the rights and equities arising through dealings with a national bank consideration will be given by the courts to the question of whether or not the application of the usual rules of equity will serve to protect or to militate against the interests of the public and the depositors, and that the interests of the public and the depositors are held to be paramount.

The written releases given by Ragan to Cliff are no more effective as a defense than are the verbal assurances given by Ragan above disposed of. In the following cases, the fact that the agreement not to enforce an obligation in suit was in writing was not permitted to allow the defendant to escape liability. *German American Finance Corporation* v. *Merchants & Manufacturers Bank,* 177 Minn. 529 (1929) *supra; State Bank of Pittsburgh* v. *Kirk, supra; Mt. Vernon Trust Company* v. *Bergoff,* 272 N. Y. 192 (1936); *Rogers* v. *First State Bank of Aguilar,* 79 Colo. 84 (1926). This Court has held that the receiver of a national bank is not bound by illegal agreements made by bank officials with depositors providing that the bank would furnish and maintain collateral to secure the deposits. Such arrangements made

with the depositors respecting the furnishing of collateral are not binding on a receiver and upon recovering the collateral he is not obliged to refund the deposit. Under such conditions, the depositor is relegated to the position of a general unsecured creditor. *Texas & Pacific Ry. Co.* v. *Pottorff, Receiver,* 291 U. S. 245, 78 L. Ed. 777 (1934); *City of Marion* v. *Sneeden, Receiver,* 291 U. S. 262, 78 L. Ed. 787 (1934).

The president of a bank, without express authorization from the Board of Directors or other governing body of the bank, has no power to release an obligation held by the bank. See: *Westwater* v. *Lyons,* 193 Fed. 817, 821, (C. C. A. 3, 1912); *Prudential Trust Company* v. *Moore, et al., supra; Wagner* v. *Central Banking and Security Company,* 249 Fed. 145, 148, (C. C. A. 4, 1918).

The rationale of these decisions is based upon the peculiar and special character of public banking institutions and the special position held by their depositors in the eyes of the law, as has been developed more fully in the forepart of this brief.

III.

Discussion of Technical Points Relied Upon by the Court Below and the Technical Defenses Asserted by the Surety in the Lower Courts.

A.

The form of the pleadings does not stand in the way of a recovery by the receiver.

In its two opinions 90 F. (2d) 862, 866, the Circuit Court of Appeals imports into the instant cases the suggestion that had the pleadings been different, the Receiver might have recovered. The Court said in its first opinion, at page 866:

> "As to whether the receiver by proper allegations of an injury to creditors, if based on facts, could have recovered in an action brought for the benefit of such creditor or creditors, is not raised by the pleadings."

And again in its second opinion the Court said, at page 867:

> "No issue is raised in the plaintiffs' brief except as to the validity of the bonds. The obligation of the surety company based on the depositors of the bank being injured by the giving of the bonds, and the receiver's claim against the surety company based on a trust relationship are not mentioned, and, we think, are not raised by the plaintiffs' counterclaims in the equity suits."

Since the gravamen of the Court's decision was to the effect that the Receiver could not recover in contract because the bank itself could not have recovered on the bonds, it would seem that the Court must have had in mind the possibility that the Receiver could have recovered had he based his action in tort for deceit. This suggestion, however, does not stand close analysis. The story of Cliff's part in the transaction was introduced in evidence by Cliff, who was called as a witness by the Surety Company. The Surety Company's answers to the actions at law and its bills of complaint seeking the cancellation of the bonds, made no reference to any intention on Cliff's part to deceive the bank examiners, but set forth only Cliff's lack of authority and the understanding between Cliff and Ragan as to the character of the transaction. Cliff's story as to the purpose to deceive the bank examiners might or might not have been believed. Obviously the Surety Company brought out the element of deceit on the theory that it would relieve it of liability.

The essence of the suggestion as to the defect in the pleadings seems to be that when the Master had found the facts in accordance with Cliff's testimony, so that the issue of fact therein involved was settled, the Receiver should have seized from the hands of the Surety Company the weapon which the latter claimed had struck down the Receiver's rights of action in contract and turned it upon the Surety Company in a new action of tort for deceit. The mere sug-

gestion calls to mind the theories of the medieval doctors who prescribed as a cure for dog-bite "the hair of the dog that bit you."

It seems unsound and irrational to say that the Receiver's rights rest in tort for deceit, because there will be no deceit and no injury unless the Surety Company is permitted to deny its obligation set forth in the bonds over Cliff's signature, supported by the power of attorney which, admittedly, is broad enough in its terms to authorize the writing of the bonds in question. The bank examiners, the Comptroller, the directors, the depositors and other creditors will not have been deceived or injured if the Surety Company is held to be estopped from denying Cliff's authority and consequently liable on its promises set forth in the bonds. The Receiver's right to recover on the contracts is predicated upon the thesis that public policy does not permit such a deceit to be practiced.

It would place an over-emphasis on the functions and importance of formal pleadings to hold that the Receiver must fail in his actions based upon the contracts contained in the bonds, because he laid his actions in contract, but that if he had phrased his declarations and counterclaims in language appropriate to actions of tort, he could have recovered (on the exact set of facts found by the Master) the same amount which he claims in his actions sounding in contract. Obviously the measure of damages would be the same in whatever frames the actions were set. Furthermore, it is significant that of the cases which have come before the courts of the several states and federal districts involving the questions here presented, all have been laid in contract based upon the instrument given to the bank concerned and never in any instance has it been suggested before that a different form of pleading should have been adopted by the Receiver.

If the alleged deficiency in the pleadings consists merely in the failure on the part of the Receiver to allege in the pleadings based on the contract that the bank examiners saw

and relied upon the bonds and that as a consequence the Bank was allowed by the Comptroller to continue its business with resulting loss to the depositors, and if the addition of these allegations would establish the Receiver's right to recover in contract, then it is obvious that this defect can be cured at any time by amendment, since the proof of such facts is established by the findings of the Master and there was no element of surprise to the Surety Company respecting the introduction thereof. U. S. C. Title 28, sec. 777; Equity Rule 19; *Seaboard Air Line Ry.* v. *Pennsylvania*, 241 U. S. 290, 294, 60 L. Ed. 1006, (1916); *Clinchfield R. Co.* v. *Dunn*, 40 F. (2d) 586, (C. C. A. 6) (1930), Cert. den. 282 U. S. 860, (1930); *Illinois Surety Co.* v. *Peeler*, 240 U. S. 214, 60 L. Ed. 609, (1916); *Richmond* v. *Irons*, 121 U. S. 27, 30 L. Ed. 864, (1887); *New York Central R. R.* v. *Kinney*, 260 U. S. 340, 67 L. Ed. 294, (1922); *Freiderichsen* v. *Renard*, 247 U. S. 207, 210, 62 L. Ed. 1075, (1918).

This Court has held that where a deficiency in pleadings is found to exist upon a determination of the rules of law applicable to the facts found in the record, the Court will assume that the amendment has been made without formal proceedings to that end, when such assumption is required for a proper disposition of the case upon its merits as disclosed in the record. *Norton* v. *Larney*, 266 U. S. 511, 69 L. Ed. 413, (1925); *Smith* v. *McCullough*, 270 U. S. 456, 70 L. Ed. 683, (1926); *Realty Holding Co.* v. *Donaldson*, 268 U. S. 398, 69 L. Ed. 1015, (1925); *Howard* v. *DeCordova*, 177 U. S. 609, 44 L. Ed. 908 (1900); see also *Grant Bros. Construction Co.* v. *United States*, 232 U. S. 647, 58 L. Ed. 776, (1914); *United Light & Power Co.* v. *Grand Rapids Tr. Co.*, 85 F. (2d) 331, (C. C. A. 6) (1936), Cert. den. 299 U. S. 591, 618; *Midland Valley R. R. Co.* v. *Excelsior Coal Co.*, 86 F. (2d) 177, (C. C. A. 8) (1936).

If such is the only deficiency with respect to the pleadings, the Surety Company cannot now take advantage of it after it has tried the case before the Master and United States District Court and argued it on appeal before the Circuit

Court of Appeals without raising the point. The suggested defect, if it ever existed, has been waived by the Surety Company because:

(a) It consented to go to trial before the Master and Auditor without objection to the pleadings as they then stood. *Laber* v. *Cooper,* 7 Wall. 565, 19 L. Ed. 151 (1869); *Fretz* v. *Stover,* 22 Wall. 198, 22 L. Ed. 769, (1875); *Argentine Mining Co.* v. *Terrible Mining Co.,* 122 U. S. 478, 30 L. Ed. 1140, (1887); *Troxell* v. *Delaware L. & W. R. Co.,* 227 U. S. 434, 57 L. Ed. 586, (1913); *Adam* v. *Norris,* 103 U. S. 591, 26 L. Ed. 183, (1881); *Ankeny* v. *Clark,* 148 U. S. 345, 37 L. Ed. 105, (1893).

(b) Because it made no objection on grounds of relevance or surprise to the introduction of evidence to the effect that the bank examiners and directors saw and relied upon the bonds and believed in their genuineness. The only objection raised to such evidence was on general grounds of immateriality. *San Juan Light & Transit Co.* v. *Requena,* 224 U. S. 89, 56 L. Ed. 681, (1912). In that case, this Court said at page 97:

> "Effect must therefore be given to the well settled rule that when the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review."

See also *Grant Bros. Construction Co.* v. *U. S.,* 232 U. S. 647, 58 L. Ed. 776; *Hardin, Admr.,* v. *Boyd,* 113 U. S. 756, 28 L. Ed. 1141, (1885); *Snyder* v. *Rosenbaum,* 215 U. S. 261, 264, 54 L. Ed. 187, (1909); *Standard Oil Co.* v. *Brown,* 218 U. S. 78, 54 L. Ed. 931, (1910); *Thomas* v. *Taylor,* 224 U. S. 73, 56 L. Ed. 673, (1912); *McCandless* v. *Furlaud,* 296 U. S. 140, 80 L. Ed. 121, (1935).

(c) It failed to assert any variance between the pleadings and the findings of the Master. *New Orleans Etc. R. R. Co.* v. *Lindsay,* 4 Wall. 650, 18 L. Ed. 328, (1866); *Wasatch Mining Co.* v. *Crescent Mining Co.,* 148 U. S. 293, 37 L. Ed.

454, (1893); *Grayson* v. *Lynch*, 163 U. S. 468, 41 L. Ed. 230, (1896).

(d) It failed to argue the alleged deficiency in the pleadings before the Circuit Court of Appeals. *Grayson* v. *Lynch*, 163 U. S. 468; *Dean* v. *Davis*, 242 U. S. 438, 61 L. Ed. 419, (1917); *Mechanics Universal Joint Co.* v. *Culhane*, 299 U. S. 51, 81 L. Ed. 33, (1936).

If the supposed deficiency consists of a failure to plead the estoppel which the Receiver claims arises to prevent the Surety Company from denying Cliff's authority, it is enough to say that under the statutes and rules of court governing the matter of pleadings in the District of Massachusetts, such an estoppel need not under the circumstances of these cases be pleaded. *Little Rock Water Works Co.* v. *Barrett*, 103 U. S. 516, 26 L. Ed. 523, (1881); *Jackson* v. *Virginia Hot Springs Co.*, 213 Fed. 969, (C. C. A. 4) (1914); *Brocklehurst & Potter Co.* v. *Marsh*, 225 Mass. 3, 113 N. E. 646, (1916); *Comstock* v. *Livingston*, 210 Mass. 581, 97 N. E. 106, (1912); *Pierce* v. *Loomis*, 224 Mass. 226, 112 N. E. 1027, (1916); *Com* v. *DiStasio*, 1937 Mass. Adv. Sh. 791, 797, 8 N. E. (2d) 923; *Pringle* v. *Storrow*, 9 F. (2d) 464 (D. C. Mass.) (1925). See also *Philadelphia W. & B. R. Co.* v. *Howard*, 13 How. 307, 335, 336, 14 L. Ed. 157, 169, (1851) In that case the Court said at page 335:

> "But if he has not opportunity to show the estoppel by pleading, he may exhibit the matter thereof in evidence, on the trial, under any issue which involves the fact, and both the court and the jury are bound thereby."

See also *Joy* v. *Godchaux*, 35 F. (2d) 649, (C. C. A. 8) (1929), Cert. den. 281 U. S. 723; *Shelton* v. *So. Ry. Co.*, 255 F. 182 (D. C. Tenn.) (1918); *New York Life Ins. Co.* v. *Rees*, 19 F. (2d) 781, (C. C. A. 8, Mo.) (1927); *United States Fidelity & Guaranty Co.* v. *Wilson*, 41 F. (2d) 319, (C. C. A. Ark.) (1930); *Foye* v. *Patch*, 132 Mass. 105, 109.

Such an estoppel is not invoked as a weapon of attack. It is not a part of the Receiver's case which rests on the Sur-

ety Company's promise. *Mt. Vernon Trust Co.* v. *Bergoff*, 272 N. Y. 192 (1936) *supra*. It arises *as a matter of law* to prevent the Surety Company from asserting a certain type of defense to the Receiver's action. Indeed it is difficult to see how the estoppel could have been pleaded at any time before the full character of the Surety Company's defense had been disclosed by the testimony of its witness Cliff upon a trial of the facts.

B.

Notice of default given by the receiver complied with the terms of the bonds.

Neither of the courts below dealt with this question in their opinions.

Copies of the bonds and endorsements appear as exhibits to the Master's report as follows:—Cronin bond, Exhibit "A" (R. 92, 93); Cronin endorsement, Exhibit "C" (R. 96); Westchester bond, Exhibit "D" (R. 96, 97); Westchester endorsement, Exhibit "E" (R. 97, 98); Stone bond, Exhibit "F" (R. 98, 99); Robinson bond, Exhibit "G" (R. 99, 100). The findings and rulings of the Master respecting the matter of notice appear in the record at pages 73-81. The Master found as a fact that each of the several notes given by Cronin subsequent to the date of maturity of the original Cronin note was a "renewal" or an "extension" within the meaning of the Cronin bond (R. 48) and like findings were made with respect to the Stone transactions (R. 98, 99, 50, 51) and with respect to the Robinson transactions (R. 72). See *Kendall* v. *Equitable Life Assurance Society*, 171 Mass. 568, 573 (1898) to the effect that the question of whether a note or debt is paid by a subsequent note, or is renewed or extended thereby, is one of fact, depending on the intention of the parties and other circumstances surrounding the transaction. See also *Dodge* v. *Emerson*, 131 Mass. 467 (1881); *Cotton* v. *Atlas National Bank*, 145 Mass. 43, 45 (1887) to the effect that whenever

it appears that it will be for the benefit of the holder of a secured obligation that the original obligation should be kept alive, the acceptance of a new note will not discharge the original debt, since it will be presumed that the creditor did not intend to give up his security.

(1) The provisions as to notice of default in the several bonds did not constitute conditions precedent to liability on the part of the Surety Company.

A provision as to notice of default will not be construed as a condition precedent, unless the wording of the notice clause is specifically phrased in terms of condition. *New Amsterdam Casualty Co.* v. *United States Shipping Board*, 16 F. (2d) 847 (C. C. A. 4), (1927); *Coventry Mutual Live Stock Inc. Assn.* v. *Evans*, 102 Pa. St. 281 (1883); *Mason* v. *St. Paul Fire & Marine Ins. Co.*, 82 Minn. 336, 338 (1901); *Kahnweiler* v. *Phoenix Ins. Co.*, 97 Fed. 562 (D. C. Kan. 1893); *Vangindertaelen* v. *Phoenix Ins. Co.*, 82 Wisc. 112 (1892); 3 Williston, Contracts (Rev. Ed.) sec. 665; 5 Joyce, Insurance (2d) Ed.), sec. 3282.

In the instant case the condition of each of the bonds appears in the second paragraph and the specific word "condition" is used. That paragraph contains no reference to notice of default. In each instance the subject of notice of default is dealt with in a separate paragraph (the third), which contains no words of condition (R. 92, 93, 96, 97, 98, 99, 100).

Likewise the several instruments given by Cliff to effect extensions of the bonds referred to as "Endorsements" did not contain any conditional language.

The Master ruled that in each instance the provisions as to notice were not conditions precedent.

(2) Even if the notice provisions were conditional, notice of default was given in each case within the time specified in the respective bonds.

(a) The Cronin Bond.

The Master ruled in effect that even if the provisions as to notice appearing in the Cronin bond and the endorsements thereto were to be construed as constituting conditions precedent, notice of default was given to the Surety Company in compliance with the terms of the instruments concerned (R. 76). The reasons upon which this ruling was grounded were fully set forth by the Master (R. 77, 78).

The Cronin bond was extended three times by successive instruments signed by Cliff called "endorsements" (R. 77). The final endorsement, dated November 2, 1931, extended the bond to secure the then existing indebtedness of Cronin to the Bank and extended the coverage of the guaranty until November 3, 1932, a period of one year. The only default possible with respect to such an obligation would be the failure of Cronin to pay the indebtedness in full on or before November 3, 1932. The receiver gave notice of default November 4, 1932, which was well within the five-day period specified in the endorsement.

(b) The Westchester Bond.

The Master ruled that the notice of default given with respect to the Westchester Discount Corporation bond complied with the provisions of the bond and the endorsements (extensions) given with respect thereto (R. 78). The Master fully sets forth the reasons upon which his ruling was based (R. 79).

The original Westchester bond was dated December 20, 1930, and obligated the Surety Company to pay the obligation of the Westchester Discount Corporation held by the Bank within thirty days after April 20, 1931. On April 20, 1931, an endorsement was delivered by Cliff extending the obligation of the bond to June 20, 1931, and on that date a second endorsement in terms identical to the first endorsement (except for dates) was given, extending the obligation to December 20, 1931. A copy of the bond appears as

Exhibit D (R. 96, 97) and a copy of the second endorsement at record, pages 97, 98 (For finding and explanation as to the terms of the first endorsement see record, page 50).

As the obligation of the Westchester Discount Corporation held by the bank had matured on April 20, 1931, and *was never renewed,* it is obvious that both endorsements were executed with the intention that they should secure the payment of the overdue obligation throughout the period specified in the respective endorsements (extensions). The debt had not been paid on December 20, 1931, and the Receiver so notified the Surety Company before the five-day period had elapsed (R. 79).

(c) The Stone Bond.

The Master made an alternative ruling to the effect that if he was in error with respect to the non-conditional character of the notice clause, then notice of default was not given to the Surety Company in accordance with the terms of the bond. There was no extension of the Stone bond by endorsement or otherwise. The bond is set forth at record, pages 98, 99.

It was dated June 2, 1931, and was conditioned upon payment by one Joseph Stone of an obligation of $52,000.00 within one year from that date. On June 2, 1932, Stone had not paid his indebtedness and the Receiver's notice was not given to the Surety Company until on or about June 30, 1932. The period of time referred to in the notice clause in the bond was ten days, but more than three months prior to the expiration of the term of the bond (namely on February 23, 1932), the Surety Company had brought its bills in equity against both the Bank and the Receiver seeking to cancel the Stone bond along with the other three bonds and denying all liability thereon. By the bringing of the suit to cancel the bond and the filing of a bill of complaint denying all liability thereon, the Surety Company dispensed with any formal proof which might have been required as a condition of its liability to

be sued. See *Royal Insurance Co.* v. *Martin,* 192 U. S. 149; 48 L. Ed. 385 (1904), in which case this Court said at page 162:

> "A general, absolute refusal to pay in any event, or a denial by the company of all liability under its policy, dispensed with such formal proofs as a condition of its liability to be sued, and opened the way for a suit by the assured in order that the rights of the parties could be determined by the courts according to the facts as disclosed by evidence."

(d) The Robinson Bond.

The Master made an alternative ruling to the effect that if he was in error with respect to the non-conditional character of the notice clause, then notice was not given with respect to this bond within the time specified therein (R. 80). The Master's reasoning with respect to this ruling is set forth in full in the record at pages 80, 81. The clause is quoted in full by the Master at page 80. Commenting upon it the Master said (R. 81):

> "This language in its entirety does . . . completely defy interpretation."

If this be true, the notice clause is a mere jumble of meaningless words which cannot be held to derogate from the promise of the Surety Company to pay the Robinson note or *any extension thereof* should Robinson fail to do so. If an attempt is to be made to judicially construe and give effect to this clause, it must be construed in accordance with the established rules governing the construction of written instruments, including the rule that language tainted with ambiguity is to be construed most strongly against the party who drew the instrument and the other rule, as stated in *Agricultural National Bank* v. *Brennan,* Mass. 1936 A. S. p. 1815, at 1817:

> "Where the language of the instrument is not clear beyond peradventure, an interpretation will commonly

> be adopted which will effectuate a reasonable and enforceable purpose to accomplish a practical and straightforward end."

The bond in question was executed by Cliff. It was obviously contemplated that the note given by Robinson to the Bank might be renewed or extended without relieving the Surety Company from obligation on the bond. Viewing the instrument as a commercial document and giving weight to the purpose for which it was given, the essence of the transaction appears to be expressed in the final clause of the instrument reading as follows:

> "the liability of the Surety with respect to any such extension or renewal, in no event to extend beyond date of July eighth, nineteen hundred thirty-two." (R. 80)

In spite of confusion and ambiguity in the early parts of the clause in question, this final provision is clear and explicit that the Surety Company's liability should extend to July 8, 1932, unless Robinson made payment before that date.

Such was Cliff's interpretation of the bond as stated in his letter to the Bank dated November 12, 1931, when specific inquiry was made by a director of the Bank (R. 129). There was no evidence that the Bank or the Receiver made demand for the payment of Robinson's renewal note when it matured December 9, 1931, or thereafter, so that even though there was no formal "*renewal*" of the note, there was an "*extension*" of the unpaid balance of Robinson's obligation which the bond was intended to secure, since the body of the instrument refers to the Robinson note or any "*extension thereof,* in whole or in part" and makes no reference to renewal. Inasmuch as Robinson's indebtedness continued unpaid until July 8, 1932, the bond, by its own terms, had continued in force up to that date, and for the further period of ten days which (if any meaning can be ascribed to the notice clause), the

instrument itself provided as days of grace for the giving of notice. Within that period, to-wit on July 10, 1932, the Receiver gave notice of default to the Surety Company (R. 81).

It is submitted, therefore, that even if the default clauses are to be construed as conditional in their operation, the condition has been met in each instance and the defense with respect to notice is without merit.

C.

The note-guaranty bond given in connection with the Bank's loan to Westchester Discount Corporation secures the obligation of the Westchester Discount Corporation actually delivered to and held by the bank.

Neither of the courts below dealt with this question in their opinions.

The findings of fact made by the Master may be summarized briefly as follows:

In December, 1930, Ragan asked Cliff to write a bond securing a note of Westchester Discount Corporation hereinafter referred to as Westchester in the amount of $40,000. On December 20, 1930, Cliff executed a bond in the name and on behalf of the Surety Company, which bond was also executed by Westchester as principal obligor. The bond is set out at R. p. 96. The bond is in the penal sum of $40,000 and is conditioned upon the payment of four notes of $10,000 each described as dated December 20, 1930, and maturing serially each month for the next four months.

The record is silent as to the date when the bond was actually delivered, but it may be fairly assumed that it was delivered to the Bank at the time when the note of Westchester, hereafter referred to, was delivered and a loan of $40,000 made by the Bank to Westchester. On or about December 23, 1930, Westchester gave a collateral form note to the Bank, duly executed, in the sum of $40,000, maturing four months from date, namely, on April 23, 1931 (R. 49).

This note was the only note of Westchester which the Bank ever held, and the loan represented by this note was the only transaction which Westchester ever had with the Bank.

Some time in April, 1931, Cliff executed in the name of the Surety Company and delivered to the Bank under date of April 20, 1931, a so-called "Endorsement" (See Ex. "E", R. 50, 97). This endorsement read as follows:

> "For value received, Note Guaranty Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $40,000, in connection with a series of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20, 1931, is hereby extended for a period of two months from this date in an amount not to exceed $40,000, or such portion thereof as may remain unpaid on date of June 20th, 1931.
>
> "In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston shall notify the Home Office of this Company at No. 80 John Street, New York City within five days by registered mail, of such default.
>
> "Witness our hand this twentieth day of April A. D. nineteen hundred and thirty-one."

On or about June 20, 1931, a second "Endorsement" was executed by Cliff in the name of the Surety Company and delivered to the Bank. This endorsement read as follows:

> "For value received, Note Guaranty Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $40,000, in connection with a series of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20, 1931, and subsequently extended for a

period of two months until June 20th, 1931, is now further extended for a period of six months from this date in an amount not to exceed $40,000, or such portion thereof as may remain unpaid on date of December 20, 1931.

"In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston and/or its successors and assigns, shall notify the Home Office of this Company at No. 80 John Street, New York City, within five days by registered mail, of such default.

"Witness our hand this twentieth day of June, A. D. nineteen hundred and thirty-one."

The Surety Company claims and the Master in his report included a so-called "ruling" to the effect that the bond in question did not secure the payment of the note actually given by Westchester, because the description of the obligation of Westchester which the bond purported to secure did not conform with the obligation actually given by Westchester to the Bank. A similar claim is made by the Surety Company with respect to the endorsements above set forth.

It is submitted that there is no merit in this contention and that the ruling of the Master in support thereof is erroneous.

The note-guaranty bond and the endorsements thereof are commercial instruments, and to determine their effect they must be construed and interpreted according to the rules of law governing such instruments.

The bond was executed and delivered in Massachusetts and the contract of suretyship or guaranty therein contained was executed within that commonwealth. Therefore, in this respect the law of Massachusetts should govern.

The rule of law governing this subject, as laid down by the Supreme Court of Massachusetts, was stated by Mr. Chief Justice Rugg in the case of *Agricultural National Bank* v. *Brennan*, Mass. 1936, A. S. 1815, at p. 1817:

> "The liability of a guarantor is to be ascertained from the terms of the written instrument by which the obligation is expressed, construed according to the usual rules of interpretation in the light of the subject matter, the well understood usages of business, the relations of the parties to each other and to the transaction, and all other material circumstances."

Substantially the same language was used by the same court in the case of *Zeo* v. *Loomis*, 246 Mass. 366 (1923), although in that case the same rule was held to be applicable to the construction of contracts of suretyship. See also *L. Littlejohn & Co. Inc.* v. *Handy*, 246 Mass. 370, 374 (1923); *Merrimac Chemical Co.* v. *Moore*, 279 Mass. 147 (1932).

In the *Agricultural Bank* case, *supra*, the court examined all of the circumstances surrounding the giving of the guaranty there under consideration, including the conversations between the guarantors and the party guaranteed. The purpose of the inquiry was to ascertain the actual subject matter of the written guaranty, as understood by the parties, since the terms of the instrument did not exactly conform with the facts relating to the indebtedness held by the Agricultural National Bank. The court was satisfied that the items of indebtedness held by the party guaranteed were in the minds of the parties as being the obligations covered by the guaranty contract. See also *Kennedy Bros. Inc.* v. *Bird*, 287 Mass. 477, 192 N. E. 73 (1934); *Talbot* v. *Rednalloh Co.*, 283 Mass. 225, 186 N. E. 273 (1933).

Applying these general principles of law to the facts in the cases at bar involving the Westchester bond and endorsements compels the conclusion that the Westchester bond was not a nullity because of the variance in the description of the details of the transaction. There can be no doubt but that an ambiguity existed, inasmuch as Westchester never gave, and so far as appears never intended to give, a series of four notes of $10,000 each maturing monthly as described in the schedule in the bond. An ex-

amination of the note actually given by Westchester under date of December 23, 1931 (R. 49), discloses the fact that it recited that the maker of the note had deposited as collateral four notes of a third party for $40,000. The existence of these four notes as collateral amply explains the clerical error in the bond.

The essential and controlling facts are that Ragan had asked Cliff to issue a note-guaranty bond to secure a $40,000 obligation of Westchester; that Westchester gave a note for $40,000; and that this note and the loan made thereon was the only transaction which Westchester ever had had or thereafter had with the Bank. There can be no real doubt as to the indebtedness which all parties to the transaction intended should be secured by the bond. The Master expressly found "that both Ragan and Cliff intended the bond to secure the Westchester note for $40,000" (R. 72).

The following facts are also significant:

(a) The original bond was signed by Westchester as the primary obligor.

(b) The Surety Company was not obliged to pay on default any of the notes referred to in the bond until the expiration of thirty days from the due date of the last maturing note, and that date was almost coincidental with the due date of the $40,000 note actually given by Westchester. Therefore, the only difference between the obligation assumed by the Surety Company according to a strict reading of the bond and the obligation to pay, on default, the single $40,000 note, is a matter of three days, involving the variance between a final due date of April 20th and of April 23rd.

(c) The first endorsement, given under date of April 20, 1931, recites the giving of a "note guaranty bond issued in favor of the Continental National Bank of Boston and binding this company to an obligation in the amount of $40,000 in connection with a series of notes of Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental Na-

tional Bank of Boston the last note of said series maturing on date of April 20, 1931. . . ." If there could be any scintilla of doubt as to whether all parties concerned originally had in mind the same debt and obligation, such doubt must be completely dispelled by the delivery of this endorsement, the language of which imports a recognition of the existence, identity and binding effect of the obligation secured and of the guaranty bond covering the same.

(d) Again, on or about June 20, 1931, another extension endorsement was delivered, which recited in similar language not only the giving and the binding effect of the original bond, but referred to the first extension of April 20, 1931.

To hold that the contract of guaranty (if otherwise enforceable), falls because of a careless description respecting an inconsequential detail, would do violence to the established rule of interpretation governing such contracts under the laws of the forum in which it was made and was executed. Even if the original bond was defective, the endorsements cured the defect and deprived the Surety Company of the opportunity of attempting to elude liability on technical grounds of misdescription and pretended consequent misunderstanding.

D.

The action taken by the Receiver to enforce certain fidelity bonds issued to the Bank by Fidelity and Deposit Company of Maryland did not constitute an election of remedy which effected a discharge of the Surety Company's liability on the note-guaranty bonds involved in the instant cases.

Neither of the courts below dealt with this question in their opinions.

The Bank held two fidelity bonds (known as Bankers' Blanket Bonds) written by Fidelity and Deposit Company

of Maryland (hereinafter referred to as the "Fidelity Company"). The maximum liability of the Fidelity Company under these bonds was $200,000.00. The bonds insured the Bank against loss, as defined in the bonds, arising through dishonest and criminal acts of employees (R. 83).

The order of events is important. On February 23, 1932, the Surety Company filed the four bills in equity here before the court denying liability on the note-guaranty bonds alleging their fraudulent character, and seeking their cancellation (R. 82).

On April 28, 1932, the Receiver submitted a notice of loss to the Fidelity Company, followed on June 2, 1932, by a proof of loss (R. 82). The notice and proof of loss contained twenty-six items totaling $501,385.24 (R. 85). Among these items were estimated losses arising from the Cronin, Westchester, Stone and Robinson transactions amounting to $127,000.00 (R. 83, 84, 85). The notice and proof of loss were not public records, and were not addressed to the Surety Company, respondent herein. The Surety Company has not been harmed by them and has not changed its position in reliance upon them (R. 90).

The Receiver's actions at law against the Surety Company on the note-guaranty bonds herein concerned were not commenced until June 8, 1932, and August 11, 1932, respectively (R. 82).

Thereafter the Receiver commenced suit against the Fidelity Company on the blanket bonds by writ dated December 21, 1932 (R. 82). These bonds provided that suit to enforce the same must be commenced within one year from the date of the discovery of any loss for which indemnity was claimed under the blanket bonds (R. 89). On June 23, 1933, the Receiver amended his declaration in his suit against the Fidelity Company and filed a bill of particulars whereby he based his claims for indemnity against the Fidelity Company with respect to the Cronin, Westchester, Stone and Robinson transactions, upon the making by Ragan in each case of a "loan with intent to defraud

insured'' (R. 82, 86). The Receiver's action against the Fidelity Company was tried upon the pleadings as so amended.

In the instant cases the Surety Company has not established that the Fidelity Company was liable to the Receiver with reference to the four transactions in question (R. 88).

On October 10, 1934 (following twenty days of trial of the Fidelity Company suit) a settlement was arrived at under which the Fidelity Company paid the Receiver $100,000.00, the Receiver gave a release to the Fidelity Company, and an agreement was made between the parties, which declared that the Fidelity Company acquired no rights against the Surety Company under the four note-guaranty bonds involved in the instant cases, that the Receiver reserved to himself all rights with respect to such bonds and that no part of the settlement money paid by the Fidelity Company to the Receiver was paid for the acquisition by the Fidelity Company of any rights against the Surety Company. Judgment was entered in accordance with this agreement (R. 87, 88). About five months after the Fidelity Company suit had been disposed of, as above stated, the actions at law in the instant cases were referred to the Auditor (R. 26), and on the same day the equity cases were referred to the Master (R. 196).

The Master ruled that the position of the Fidelity Company with respect to the Cronin, Westchester, Stone and Robinson notes (and the note-guaranty bonds held to secure the same) was that of a sub-surety; that it was not a prerequisite to the right of the Receiver to recover against the Fidelity Company with respect to these transactions that he should first exhaust his remedies against the Surety Company upon the note-guaranty bonds; and that had the Receiver recovered against the Fidelity Company with respect to these note transactions, the latter would have been subrogated to the Receiver's rights with respect to the note-guaranty bonds (R. 89).

On these facts the Surety Company argued in the courts below that the Receiver's action with respect to the fidelity or blanket bonds constituted an election of remedy which discharged the Surety Company from obligation in the instant cases. The Master ruled that there was no election of remedy such as to constitute a defense to the Receiver's claims and supported this ruling by a discussion of the question of law involved (R. 88, 89, 90).

The facts presented in the instant cases do not permit the application of the principles of law involving election of remedy. It is not a situation where the Receiver as a wronged party, has the option of affirming or disaffirming a transaction or of accepting or repudiating a title and where such party definitely exercises such option. See *United States* v. *Oregon Lumber Company,* 260 U. S. 290, 67 L. Ed. 261 (1922); *Frisch* v. *Wells,* 200 Mass. 429, 86 N. E. 775 (1909); *Scarf* v. *Jardine,* 7 A. C. 345 (1882); *Washburn* v. *Great Western Insurance Co.,* 114 Mass. 175 (1873).

In the instant cases the Receiver had in his hands for enforcement two separate groups of contracts made in favor of the Bank. One of these groups consisted of the fidelity or blanket bonds which provided for indemnification against losses arising from the dishonesty of the Bank's officers or employees. The other group of contracts were the four note-guaranty bonds concerned in the instant cases, which guaranteed the payment of the Cronin, Westchester, Stone and Robinson notes.

The sole basis of any claim the Receiver might have had against the Fidelity Company with respect to these transactions was Ragan's fraudulent participation in the making of the loans. The sole basis of the Surety Company's liability on the bonds is its promise to pay the notes upon default by the makers thereof. The two are not concurrent and inconsistent, but are separate and wholly unrelated.

If the Receiver could have established in his suit against the Fidelity Company that the transactions entered into

by Ragan, whereby the Bank's money was paid out on the Cronin, Westchester, Stone and Robinson loans, constituted thefts from the Bank, he could have recovered on the fidelity or blanket bonds and the Fidelity Company would have become subrogated to the Bank's and the Receiver's rights in the notes and in the note-guaranty bonds securing the same. Thus it is plain that the claims asserted by the Receiver against the respective insurance companies were not in the same right and hence there could be no election of remedy with respect thereto. This point is fully discussed and elucidated in the case of *Grubnau* v. *Continental National Bank*, 279 Pa. 501, 124 Atl. 142 (1924). Had the Receiver been indemnified by the Fidelity Company for these losses and had he later recovered against the original borrowers or any of them or against the Surety Company as an obligor on the bonds securing the notes, he would have been obliged to account to the Fidelity Company for the proceeds of any such recovery.

Had the Surety Company promptly responded to the Receiver's demand upon the note-guaranty bonds, the latter could not have recovered damages against the Fidelity Company for these items, but this result would have followed because his trust would have suffered no loss from Ragan's fraud, and, there being no loss, the Receiver would not have been entitled to indemnity. The fact that under such circumstances the Receiver would not have recovered against the Fidelity Company would not have arisen because of any election of remedy on his part. It would not have been a case of election of inconsistent remedies, but rather a situation where there was no loss calling for indemnity, regardless of the honesty or dishonesty of Ragan's intentions at the time that he made the loans to the four borrowers in question.

If it could be held that the bringing of a suit or suits constituted a decisive election of remedy, then the election would have taken place when the Receiver commenced his suit against the Surety Company, which in each instance

preceded the commencing of suit against the Fidelity Company (R. 82). It was a mere incident that the suit against the Fidelity Company was tried first, and the record is clear that the Receiver had abandoned any attempt to hold the Fidelity Company with respect to the four transactions here concerned at the time when judgment was entered in his favor for an agreed amount covering other losses sustained by the Bank by Ragan's dishonesty (R. 87, 88). The Fidelity Company had persisted in its denial of liability as to the four transactions herein concerned and the Master found that liability on the part of the Fidelity Company with respect thereto had not been established (R. 88).

Whatever language the Receiver may have used in his dealings with the Fidelity Company to identify the transactions whereby the Bank was mulcted through the connivance of Ragan, Cronin, Westchester, Stone, Robinson and Cliff, the issue was finally joined and the case tried up to the point of settlement, upon the clear-cut theory that the Receiver was claiming *indemnity* for actual or prospective losses resulting from the making of dishonest loans by an officer of the Bank (R. 86). The losses with respect to which the Receiver made claim for *indemnity* from the Fidelity Company did not spring from the giving of the bonds. The bonds were incidents of the loan transactions which resulted in losses and merely performed the function of "camouflage" to cover up the losses.

The doctrine of election of remedies is not a rule of substantive law. It is a rule of procedure or of judicial administration and rests upon equitable principles. See *United States* v. *Oregon Lumber Co.*, 260 U. S. 290 (including dissenting opinion at page 304); 67 L. Ed. 261, 272 (1922).

In the case of *Friederichsen* v. *Renard*, 247 U. S. 207, 213, 62 L. Ed. 1075 (1918) this court said:

> "At best this doctrine of election of remedies is a harsh and now largely obsolete rule, the scope of which should not be extended."

It would be a distortion of the equitable principles upon which the law of election of remedies is founded (and which are closely akin to the principles governing the law of estoppel) if a party, having two separate rights grounded on contracts made by two separate promissors for separate considerations, should lose his rights against one promissor by pursuing the other promissor when there was no privity of contract or interest between the two promissors and the circumstances surrounding the making of the separate contracts were wholly unrelated. Such is the situation in the instant cases, with the added factor that to protect any possible rights the Receiver might have had against the Fidelity Company respecting these four note transactions, he had to bring suit within one year from the discovery of Ragan's part in making the four loans (R. 89). See *Fitchburg Savings Bank* v. *Massachusetts Bonding & Ins. Co.*, 274 Mass. 135, 174 N. E. 324 (1931).

The Surety Company has not attempted to show that it was in any way prejudiced by the Receiver's pursuing both possible remedies. In pursuing them the Receiver has not repudiated any title or disaffirmed any transaction. From the beginning the Receiver held consistently to the position that regardless of Cliff's part in the machinations of Ragan, the Surety Company was liable on the promise contained in the note-guaranty bonds.

The suggestion made by counsel for the Surety Company that the principles of election of remedies are applicable because the Surety Company had some sort of a contract of reinsurance with the Fidelity Company is without merit, being wholly immaterial, as the Master ruled. Counsel for the Surety Company do not attempt to claim that the Surety Company paid any portion of the loss actually paid by the Fidelity Company to the Receiver under the settlement above referred to. Although the instant cases went to trial on the facts more than five months after the suit against the Fidelity Company had been completely disposed of (R. 82, 83) it did not appear that the Fidelity Company had ever asserted any claim that the making of the settlement

imposed liability on the Surety Company under its reinsurance contract.

It is submitted, therefore, that the suggested defense of election of remedy is without merit.

CONCLUSION.

The Receiver, both in his actions at law and in the counterclaims set up in his answers to the bills in equity, seeks to compel the Surety Company to honor the promises contained in the note-guaranty bonds. The Surety Company's defenses (if we may adopt the military metaphor) consist of four lines "arranged in depth".

The first line is based upon the assertion that Ragan (the Bank's president) assured Cliff (the Surety Company's agent) that the bonds would not be enforced, which assurances were supported by written releases executed by Ragan in the name of the Bank. This line of defense is rendered untenable by the overwhelming weight of judicial authority which holds that such secret assurances, agreements and releases do not bind the Receiver of a defunct banking corporation when they relate to promissory instruments and obligations given to the bank with the intent that they shall have the appearance of sound and enforceable obligations and are relied upon as such by the bank examiners with consequent loss to the depositors and other creditors.

The Surety Company's second line of defense rests upon the theory that Cliff violated the secret instructions given him by his principal respecting his authority to execute instruments such as those which are involved in the instant cases. But this defense is disposed of by the well-established rule of law which holds that the Surety Company is estopped to deny Cliff's authority in the premises, because it had armed Cliff with full indicia of authority to execute just such instruments as these note-guaranty bonds by furnishing him with a written power of attorney which on its face gave him such authority and ratified and adopted all

that Cliff might do within the scope of the written power. The Surety Company fortified this grant of power and ratification by supplying Cliff with multi-originals of the power, duly certified and authenticated by the chief executive officers of the Surety Company with the intention that he should use them, just as he did in the instant cases, as evidence of his unlimited power and of his principal's ratification of all that he might do pursuant thereto.

The third line of defense rests upon the theory that because Ragan knew that Cliff was acting in fraud of his principal and in violation of his secret instructions, his knowledge is to be imputed to the Bank and such imputation defeats the Receiver's right of recovery, in that the Receiver can stand no better than the Bank, and recovery would have been denied to the Bank itself, as a solvent going concern, because of this imputation. But the situation in the instant cases is not one which calls for or permits the application of the legal fiction of imputation of knowledge. Ragan's knowledge, even if imputable to the proprietors of the Bank who selected him, is not to be imputed to the public officials (the Comptroller of the Currency and the bank examiners) who, in the case of a national banking corporation, are the representatives of the depositors and creditors of the bank. The fiction of imputation of knowledge is an invention of the law made for the purpose of placing a loss or injury where it equitably belongs. But in the instant cases neither the depositors and creditors nor the public officials designated by law to represent and protect their interests, were responsible for the selection of Ragan nor could they exercise any control over his actions until such time as the abuse of his position as a bank official was discovered, whereupon the protective provisions of the national banking statutes could be and were invoked by the Comptroller in aid of the depositors and creditors. To invoke the fiction of imputation and to cause it to strike down the protective arm of the Comptroller, would result in placing the loss resulting from the misconduct of Ragan and Cliff upon the innocent depositors and

creditors, instead of upon the Surety Company, which had made the fraud possible by reason of the manner in which it had seen fit to conduct its business, involving the giving to Cliff of an instrument carrying unlimited authority and unrestricted ratification. If applied here the fiction would bring about an inequitable result, which is the exact reverse of the purpose for which legal fictions have been created.

The fourth line of defense consists of four disconnected and unrelated positions, namely the alleged defect in the pleadings, suggested by the Circuit Court of Appeals for the First Circuit; the alleged deficiency with respect to notice of default by the principal obligors on the bonds; the alleged variance between the Westchester Discount Corporation note and the description thereof in the note-guaranty bond given to secure the same; and the alleged fatal election of remedy consisting of the prosecution by the Receiver of his rights of action under the fidelity bonds issued by Fidelity and Deposit Company of Maryland. Further comment on these points is not necessary, as they have been fully discussed above and shown to be without substance or merit.

It is submitted, therefore, that the protection of the national banking system, the establishment of uniformity throughout the nation with respect to the rules of law applicable to public banking institutions, and the ends of justice in the instant cases, all demand that relief be granted to the Receiver in aid of the depositors and other creditors of the Bank, and that the orders and decrees of the Circuit Court of Appeals for the First Circuit be reversed.

Respectfully submitted,

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APPENDIX.

Title 12 U. S. C., sec. 1:

"There shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds and, under the general supervision of the Board of Governors of the Federal Reserve System, of all Federal reserve notes, the chief officer of which bureau shall be called the Comptroller of the Currency and shall perform his duties under the general directions of the Secretary of the Treasury."

Title 12 U. S. C., sec. 9:

"The Comptroller of the Currency is authorized to employ such additional examiners, clerks, and other employees as he deems necessary to carry out the provisions of chapter 9 and to assign to duty in the office of his bureau in Washington such examiners and assistant examiners as he shall deem necessary to assist in the performance of the work of that bureau."

Title 12 U. S. C., sec. 14:

"The Comptroller of the Currency shall make an annual report to Congress, at the commencement of its session, exhibiting—

* * * * * * *

"Third. Any amendment to the laws relative to banking by which the system may be approved, and the security of the holders of its notes and other creditors may be increased."

Title 12 U. S. C., sec. 27:

"If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate,

under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter."

Title 12 U. S. C., sec. 55:

"Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such associations, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section 192 of this title. *And provided,* That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto), to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders."

Title 12 U. S. C., sec. 161:

"Every association shall make to the Comptroller of the Currency not less than three reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president, or of the cashier, or of a vice president, or of an assistant cashier of the association designated by its board of directors to verify such reports in the absence of the president and cashier, taken before a notary public properly authorized and commissioned by the State in which such notary resides and the association is located, or any other officer having an official seal, authorized in such State to administer oaths, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified, and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him; and the statement of resources and liabilities, together with acknowledgment and attestation in the same form in which it is made to the Comptroller, shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to obtain a full and complete knowledge of its condition.

* * * * * * * *"

Title 12 U. S. C., sec. 191:

"Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a

certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192."

Title 12 U. S. C., sec. 194:

"From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Title 12 U. S. C., sec. 481:

"The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every member bank other than those expressly excepted by section 330 of this title, at least twice in each calendar year and oftener if considered necessary: . . ."

Title 28 U. S. C., sec. 777:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or

want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 455.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank, *et al.*,
Petitioners,

v.

STANDARD SURETY & CASUALTY CO. OF NEW YORK,
Respondent.

(And Six Other Actions Consolidated Therewith)

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

A.

DISTINCTIONS TO BE OBSERVED IN CONNECTION WITH CONTENTION OF RESPONDENT THAT RAGAN'S KNOWLEDGE MUST BE IMPUTED TO HIS BANK.

Respondent, in his brief starting at page 18, contends, in line with the position taken by the court below, that the knowledge which Ragan had concerning the irregularities in connection with the issuing of the bonds sued upon by